87-769 (1)

Supreme Court, U.S.
FILED
OCT 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

John Olaques,

Petitioner,

versus

Securities and Exchange Commission,

Respondent,

Richard James French, d/b/a Neild Cruikshank & Company-Pacific; Jose Pascual; Harry C. Polonitza and Company; Steven S. Mithcell and Alan Schmidt,

Respondent,

David Chan; Opex Investments Inc.; Rudolf M. Binnewies; William A. Charles; Sold Inc., Montgomery and Mader, N.A., Montgomery; Richard E. Mader and Craig A. Resnick,

Respondent,

versus

Certain Unknown Purchasers of the Common Stock of and Call Options for the Common Stock of Santa Fe International Corporation; Credit Suisse; Swiss American Securities, Inc., Citibank, N.A.; Lombard Odier & Cri.; Morgan Guaranty Trust Company of New York; Swiss Bank Corporation; Drexel Burnham Lambert, Inc.,; The Chase Manhattan Bank, N.A.; Moseley, Hailgarten, Estabrook & Weeden, Inc.; Faisal Al Massoud Al Fuhaid,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ON BEHALF OF JOHN OLAQUES

CHARLES A. O'NIELL, JR.
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Dated: October 7, 1987

180 12

QUESTIONS PRESENTED FOR REVIEW

The United States Securities and Exchange Commission initiated the present action as an Injunction and Disgorgement Proceeding charging the Defendants with insider trading activities in the stock and stock options of the Santa Fe International Corporation.

Meanwhile, contemporaneously, in two (2) private proceedings, claims against these same S.E.C. Defendants were being pursued in New York and California.

In February, 1986, the S.E.C. and the private litigants joined forces and proposed a settlement for the Court to approve. In conjunction therewith, the District Court was requested to enter an Order providing for the manner in which the disgorged funds would be disbursed to those injured by the illegal activity. The Order was signed pursuant to a hearing at which only those proposing the settlement were present. Members of the investing public who were injured by the illegal activity were not given notice of the hearing. Included within the group of individuals not given notice was John Olaques, Petitioner herein.

The Order established the parameters by which it was determined who was to participate in the distribution of the disgorged funds. It was only after these parameters were approved by the Court that John Olaques and the other estimated 1900 members of the public who were injured by the illegal activity, were given an opportunity to voice their objections to the plan at a non-evidentiary hearing on June 13, 1986.

John Olaques voiced his objection and the Court denied him relief because it found he did not trade within the window period established in the plan previously approved by the Court. The Second Circuit affirming the decision of

the District Court similarly found that John Olaques did not trade during the window period and lacked standing to challenge the settlement order on appeal.

The question presented by the Second Circuit decision is:

1) Whether John Olaques has been deprived due process of law since the Order which established the "trading window period" and thus, whether he had standing, was signed pursuant to a hearing for which he was not given notice.

RULE 28.1 STATEMENT

As far as Petitioner can determine, the caption of this case includes the names of all parties to the proceeding whose Judgment is sought to be reviewed.

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IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

Securities and Exchange Commission,
Respondent,

Richard James French, d/b/a Neild Cruikshank & Company-Pacific; Jose Pascual; Harry C. Polonitza and Company; Steven S. Mithcell and Alan Schmidt,
Respondent,

David Chan; Opex Investments Inc.; Rudolf M. Binnewies; William A. Charles; Sold Inc., Montgomery and Mader, N.A., Montgomery; Richard E. Mader and Craig A. Resnick,
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Respondent,

versus

Alan E. Zimmer, Jr., and John Olaques,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, John Olaques, respectfully prays that a Writ of Certiorari issue to review the Judgment of the Court of Appeals for the Second Circuit entered on July 10, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 817 F.2d 801 (2nd Cir. 1987). The Order of the Court of Appeals dated July 10, 1987 denying a Petition for Rehearing en Banc is not reported. The opinion of the District Court rendered on July 11, 1986 is not reported. These opinions are reprinted in the Appendix to this Petition.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 6, 1987. A timely Petition for Rehearing en Banc was denied on July 10, 1987. This Court has jurisdiction to review the Judgment of the Court of Appeals pursuant to 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

In October of 1981, the United State- Securities and Exchange Commission initiated the present action as an Injunction and Disgorgement Proceeding, against Certain Unknown Purchasers of Common Stock and Call Options of the Santa Fe International Corporation, charging the Defendants with insider trading activities in the stock and stock options beginning in September of 1981.

The action was brought against certain unknown purchasers and named as nominal defendants, certain entities which had acted for the unknown purchasers, and profits of the unknown purchasers were tied up in the hands of the nominal defendants through Injunction to the total amount of some Ten Million Dollars.

Meanwhile, and contemporaneously, in two (2) private proceedings, claims against these same S.E.C. defendants, were being pursued in private litigation in New York and California.

By February, 1986, the individual defendants had been identified and brought into Court in both the S.E.C. and the private suits; and the Order for handling the disgorged funds had been proposed by the S.E.C. and the private litigants, and approved by the Court. The order proposed;

> "... to deal with a procedure pursuant to which persons or entities engaged in direct or contemporaneous trades in common stock and call options for the common stock of Santa Fe with defendants and who claim to have suffered actual losses may be fairly and justly compensated for their alleged losses."

The Order dealt with approximately Ten Million Dollars of seized, illicit profits of the inside trader-defendants.

Of this fund, the Court should understand that approximately Two Million Dollars was disposed of, sub silentio, by permitting the insiders to keep that amount in a Settlement through the Court though the Court does not appear to have ever been informed of this.

The Order diverted Two Million Eight Hundred Fifty Thousand Dollars to be paid directly, and then to the attorneys of the so called "litigating options traders," referring to the Plaintiffs in the two private suits. These funds are not otherwise accounted for in any way. Of the balance of the impounded funds, Four Million Four Hundred Ninety-Nine Thousand Five Hundred Twenty-Seven Dollars were placed into a Claim Fund "A"; which was subdivided into a Sub Fund #1 and Sub Fund #2. Sub Fund #1 represents a "Direct Trading Loss" Sub Fund. Sub Fund #2 represents a "Contemporaneous Trading Loss" Sub Fund.

Another fund was established in the amount of Four Hundred Ninety-Two Thousand, Three Hundred Seventeen Dollars to pay to stock sellers.

A time window on stock sellers was set as September 21, 1981 through September 23, 1981. The Order established a time window for parties selling Santa Fe call options; so that if they sold the call options between September 22, 1981 through October 1, 1981, option traders were eligible to present their claims for the losses; and would be entitled to participate in the disgorged profits.

A Master was appointed to over see, invest and disburse the claims funds. The Master was also entrusted with the task of giving notice to potential claimants who, like the

private litigants, suffered damages as a result of the illicit trading.

Notices were published and potential claimants were given an opportunity to object to the claims procedure proposed by the Order.

Pursuant to the procedure set forth by the District Court, John Olaques timely filed his objections to the Order, establishing a claims fund and claims procedure since the established procedure prevented him from participating in the fund.

A hearing was held on the objections on June 13, 1986 at which time the Court heard argument of counsel and over ruled the objections. A Stay Order was issued keeping the funds "A" and "B" from being disbursed.

Subsequently, John Olaques filed a Motion to Intervene in the S.E.C. action and this Motion was likewise denied.

It is from these two decisions that Appellant appealed and sought relief from the United States Court of Appeals for the Second Circuit.

The Court of Appeals affirmed the decisions of the District Court and an application for Rehearing en Banc was filed. The Application for Rehearing en Banc was likewise denied and it is from these decisions of the Appellate Court that John Olaques seeks relief.

ARGUMENT

The future which recent developments on Wall Street protend for the Federal Judiciary is apparent to all. The Judiciary faces an exponential, incremental surge of disgorgement litigation which is staggering to contemplate. The core

issues of this Appeal are going to be repeated in proceedings which will be in near unmanageable numbers under the present state of the law. We say this for we find that from the events of this case, there is a woeful dearth of guidance in the jurisprudence, to inform the S.E.C., the contending litigants, and the Courts as to the guidelines for disgorgement fund management. Such a situation will have a disastrous impact on the efficiency of Federal Judicial Administration as the District Courts laboriously, and case by case, fashion, as they will have to do, a body of law which will eventually have the effect of forming the rules which will control these types of proceedings at some far off future date.

We urge this Court to consider the benefits of using this case as a vehicle for Your Honors to lay down a determination as to how disgorgements and distributions of these enormous sums should be handled.

This case offers the prospect of an object lesson in what should be done that was not done; and what should not be done that was done, and thus, marks the course for the flood of litigation which is surely on the way.

Aside from the procedural guidelines which can be established, it is necessary that it be determined who the players should be. We strongly urge that the decision that Appellant, John Olaques, who lost Five Hundred Thousand Dollars, does not have the requisite standing to assert a claim, in a proper judicial hearing, flies in the face of the decision of this Court in *Blue Chip Stamps v. Manner Drug Store*, 421 U.S. 723, 44 L.Ed.2d 539, 95 S.Ct. 1917 (1975).

There is an extra ordinary spread of characters in this litigation. There is the S.E.C., the major role player throughout, who created the litigation, as it were, and who successfully prosecuted their "public" suit to the point where a Ten Million Dollar fund had been identified, and restrained,

and where facts had been amassed to the point where the case was right to compel disgorgement.

The fund is said to have been the largest which had been identified and captured up to the time of this suit.

The case represents the first successful application of the new treaty provisions between the United States and the Swiss Governments, which made the successful identification of the insiders possible in this case.

Before passing on to a discussion of the other players though, we remind the Court, that, say what you will about the high purpose of the S.E.C. in enforcement litigation, nothing can change the fact that they, the S.E.C., are a party litigant. True, they represent and pursue the interests of the public weal; and they do not represent the special interests of individual parties; yet they, the S.E.C., are bound to be influenced by many of those same concerns that guide the actions of the private litigant - to win, to have the case over, to win less to keep from losing more.

We have also, of course, the insiders and all of their special interests - belligerent adversaries to everyone.

We have two groups of private litigants, the French Plaintiffs and the Charles Plaintiffs, who are private litigants against the insiders with suits pending in California and New York, and who are adversary litigants to all comers in these disgorgement proceedings, where they seek to recover all that they can to satisfy their own selfish interests.

These two groups of private litigants add breadth and variety to the types of claims which the Court must deal with here, and thus marks the case as a logical candidate for review.

These two groups of private litigants, it must be observed, have done exceedingly well for themselves, and a major question posed in these exceedingly irregular proceedings is - Should this result be allowed to stand for the future? Should private litigants be awarded such a bountiful bonus by the S.E.C. in its recommended distributions?

In the first place, in addition to claiming the benefits of a "private" litigant, they appear to have arrogated to themselves the position of "direct trader" which seems to be a category of a litigant carrying incredible benefits. We say arrogated to themselves, because no hearing has determined this. For instance, we will see in this case that these private litigants were paid immediately out of the disgorged funds - to be shared just by them - 2.8 Million Dollars. They already have the money.

We see that they have unquestioned standing and appear in the Court of Appeal as "Plaintiffs/Appellees" though we see no where they have intervened in this S.E.C. action, or had their private actions consolidated with this one. We also see that they participated intimately in formulating the distribution and the claims procedure, which favored them to such an outrageous extent.

The opinion of the District Court and the Court of Appeal does not present a clear picture of how the case got to where it is. It is extremely important for the Court to understand this. By February 24, 1986, the case being then in progress for five years, it appears to have become ripe for settlement. By letter of that date, the S.E.C. addressed Judge Conner, regarding a "hearing" which was scheduled for February 26, 1986 at 9:45 o'clock, a.m. The proposed plan which was enclosed and which was to be presented to the Court for its approval two (2) days hence, runs for fifty-nine pages in the record. According to the letter, the submitted plan is keyed to a private settlement by the private litigants, though the

letter doesn't mention, what this settlement is. As a matter of fact, it was the payment to the private litigants of 2,8 Million Dollars of the settlement fund under seizure by the S.E.C., forthwith, that constituted the settlement.

The letter did not mention, and the plan does not mention, that the insiders were being allowed to retain 2 Million Dollars of their fraudulent profits.

On February 26, 1986, a so called "hearing" was had before Judge Conner. This amounted to a ten page colloquy in the record between the Judge and the several lawyers present. It could not have taken more than a few minutes. Of course, nobody objected since the parties submitting the plan were the only ones present.

Unrepresented and without a voice in the "plan" were Olaques and an estimated 1900 other market investors who suffered losses as a result of trading in a tainted market.

At the "hearing" before Judge Conner on February 26, 1986, Judge Conner expresses his concern about the unrepreesented members of the public who may have been injured by the illegal trading. This is demonstrated by the following colloquy;

> "The Court:
>
> Is there anyone else representing the non-litigating investors who are going to be claimants against the funds?"

It is of particular concern that at this point no one replies to the Courts inquiry and nevertheless, the Court proceeds to ask the following question;

> "The Court:

> I assume you are all familiar with the terms of the proposed order established in the claims procedure. Is there anyone who objects to the entry of that order?"

The Court approved the plan. The 2.8 Million Dollars was paid out immediately to the few litigating market makers; the 2 Million Dollars was kept by the inside traders, and the plan assumed the assailable character created by the S.E.C.'s proposal and the Judge's stamp of approval. That is how the "plan" got to where it is today.

It is apparent that the 2.85 Million Dollars was distributed to a certain elite group of option traders who, for reasons unknown, the S.E.C. has given preferential treatment in the distribution of disgorged profits. It is of extreme importance for purposes of this petition that these funds were distributed to this preferred group before any similarly situated traders could assert their claim to the funds disgorged.

Although there have been many cases which have addressed when the Court in S.E.C. enforcement action may, in the exercise of its equitable powers, order disgorgement of profits, there have been no cases which have discussed the manner in which disgorged profits are to be disbursed to those members of the public who are injured by illegal activity. Although it is recognized in those few cases which have discussed the practical details of the disgorgement that a receiver or trustee should be given the task of locating those members of the public who are injured by illegal activity and pay each party an amount determined by the trustee to be fair and equitable, there never has been a discussion concerning the manner in which it is to be determined who is injured by illegal activity; what type of notice is to be given to those members of the public who may have been injured by the illegal activity; and which type of proceedings will

be held and who will be given notice thereof in order to formulate a disbursement plan which is fair and equitable.

It is clear that when the S.E.C. brings an action such as the one presently before this Court, it appears not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest and enforcing the securities laws. See *S.E.C. v. Management Dynamics*, 515 F.2d 801 (2nd Cir. 1975); *S.E.C. v. Commonwealth Chemical Securities, Inc.*, 410 F.2d 1002 (SD, NY, 1976).

In acting as the statutory guardians safeguarding the public interest, it would appear that the S.E.C. should be required to make inquiry as to what members of the trading public were injured before disposing of any portion of the disgorged profits forming the fund which is the subject of this Petition. However, the S.E.C. failed to make this inquiry and although a hearing was held to gain approval of a plan to disburse the funds, that hearing was held without giving notice to the public and was summarily approved in the absence of any objection from the very parties who drafted and submitted it. It was only after that hearing and the Order was already approved by the Court that Petitioner herein was given an opportunity to make objections to the plan approved by the Court. It is to be noted that at this point approximately 4.8 Million Dollars of illicit profits seized in connection with the S.E.C.'s enforcement action had already been disbursed.

Petitioner suggests that Judge Conner was aware that it was necessary to have the public represented at this initial hearing whereby the litigating option traders and the S.E.C. gained the Court's approval of the plan.

It is clear that if the parties that formulated the plan for their own benefit were the only parties represented at this

hearing, there would not be an objection raised at that hearing. However, if effort had been made to notify those members of the investing public who were injured by the illegal activity prior to this hearing so as to allow them an opportunity to be represented at this hearing, we know as a result of the proceedings which are currently pending, that there would have been objections.

It was only after the hearing of February 26, 1986 that notice of the disgorgement proceeding was sent to 1900 persons who were thereby notified of their right to appear at a hearing and object to the distribution and/or file claims for reimbursement of their losses. Significantly, such notice did not disclose that a portion of the fund had already been distributed and that potential claimants were being deprived of an opportunity to be heard in this regard. Therefore, the June 13th hearing with respect to this aspect of the proposed distribution plan was a sham. No showing was made by any of the proponents of the plan to justify the disproportionate payment to the Charles and French Plaintiffs or the return of approximately 2 Million Dollars to the defendants. Petitioner proposes that the S.E.C. and the other proponents of the distribution plan, having submitted to the jurisdiction of the District Court for the express purpose of procurring a judicial determination of the fairness and reasonableness of the distribution plan, are required to have such proceeding comport with fundamental notions of due process. Among other things, due process requires that the notice provided to the claimants at bar adequately apprise them of the proposed distribution of the fund and offer an opportunity to be heard. With respect to the substantial distribution made to the litigating option traders and a return of a substantial portion of the fund to the defendants, the notice and hearing fell short of required constitutional standards. *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94, L.Ed. 865, 873 (1950); See also

Grunin v. International Bank of Pancakes, 513 F.2d 114, 120 (8th Cir. 1975), Cir. denied, 423 U.S. 864 (1976); *In Re: Agent Orange Product Liability Litigation*, 597 Fed.Supp 740, 758 (Ed. NY. 1984).

On Appeal, the Court of Appeal reasoned that Judge Conner did not abuse his discretion in approving the settlement agreement because, given the limited size of the disgorgement pool, it was fair to compensate those most grievously injured claimants with the greater share of the fund. It was held that John Olaques lacks standing in these proceedings because disgorgement of profits under the settlement agreement was based solely on defendants potential Rule 10 (b)(5) liability to insider trading during the "window period" and Mr. Olaques completed his transactions before the commencement of the window period and did not trade during the window period. However, the fundamental question is how has the "window period" been established in order to determine whether Mr. Olaques has standing. The window period was the creation of an Order signed by Judge Conner as the result of a hearing held on February 26, 1986. Was Mr. Olaques given notice of this hearing? Was he afforded an opportunity to be heard at this hearing and to present evidence which may have expanded the window period? In his original brief, Mr. Olaques contended that the District Court erred by limiting the participation in the claims fund to those who entered the option market after September 22, 1981 because the profits forming the claim fund were obtained from individuals who also illicitly traded stock prior to September 22, 1981.

At the hearing of June 13, 1986, counsel for Petitioner advised the Court that it had been alleged in one of the private civil actions that Mr. Nassir, a defendant in the present S.E.C. action, had, together with Mr. Darius Keaton and other tippees, jointly purchased fifteen thousand shares

of Santa Fe International Corporation stock based on non-public information told to Mr. Keaton in confidence on or about August 8, 1981.

Upon being advised of this information, the Court inquired from counsel for the S.E.C., Mr. Michael Mann, if he had "any information on any of the defendants who contributed to this fund engaged in any trading prior to September 22, 1981."

Mr. Mann then responded as follows:

> "Mr. Mann:
>
> Your Honor, Michael Mann, for the Securities and Exchange Commission.
>
> None of the defendants in this action traded options prior to mid-September, 1981, and the claim that Mr. Recile is making dealt with the options.
>
> As he spoke and quoted from the complaint, that dealt with common stock purchases by Mr. Keaton who has settled the case with the S.E.C. in 1982, *and Mr. Nassir, who as a defendant in this case*. (Emphasis added)
>
> However, I would note that all of the funds in which Your Honor froze on October 26, 1981 when the S.E.C. initiated this action were profits which were earned in common stock and options from purchases starting on September 21, 1981.

> The S.E.C. did learn additional information with respect to common stock purchases and the purchase by the brother-in-law of Mr. Nassir earlier in September. However, that was not part of the action, and it was not part of the funds which were frozen in Court when this action was initiated.
>
> Therefore, the disgorged funds related to only the transactions from late September and early October, 1981.

Hence, it is clear that the S.E.C. had information in support of Petitioner's contention that Mr. Nassir did acquire stock together with Mr. Keaton in confidence on or about August 8, 1981 and had Appellant been given notice of the hearing of February 26, 1986, Judge Conner would not have been made aware of it for the first time on June 13, 1986. Had Judge Conner been made aware of this illegal activity prior to June 13, 1986 would he have enlarged the window period so as to include John Olaques? Would an Order have been signed allowing Mr. Nassir to keep a portion of his ill-gained profits? Would the parties who were harmed by the illegal trading prior to September 22, 1981 been able to share in the distribution of the disgorged profits contributed by Mr. Nassir to the claims fund? If a hearing would have been held, could a different plan of distribution been approved? Under a plan approved after hearing the evidence, would Mr. Olaques have standing?

These questions have not been answered because the procedures which we normally follow affording a litigant his day in Court have not been followed. At some place along the line, we have created new rules.

Are we to allow the defendants who illegally traded to keep some of their ill-gained profits? It is clear that where liability under 10 (b) has been established, the Court should fashion relief structured to deprive the defendant of all gains derived from the illegal activity. See *S.E.C. v. Lund*, 570 F.Supp 1397 (CD CA 1983). Effective enforcement of the law requires the the S.E.C. be able to make violations unprofitable by making violators disgorge their profits. *S.E.C. v. Commonwealth Chemical Securities, Inc.*, 410 F.Supp 1002 (SD NY 1976). The disgorgement should act as a deterrent to prevent illegal activites. By allowing the defendants to keep some of the ill-gained profits and to disgorge others, the Court sanctions the illegal activity which is the subject of the S.E.C. enforcement action.

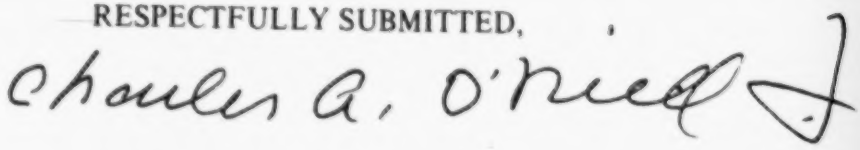
The Petitioner, John Olaques, created a position of having written and had open 535 call contracts on the stock of Santa Fe International. Most of these call positions were created between August 11, 1981 and September 21, 1981 and remained open until October 6, 1981. He lost Five Hundred Thousand Dollars as a result of the illegal activities for which the defendants have been awarded a portion of their ill-gained profits.

It is of extreme importance that this matter be given the attention of this Court. It is this Court's decision which will set the pace for future inside trading cases and send a message to those who have become wealthy as a result of their illegal trading.

CONCLUSION

For the above reasons, Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted and that after review, the decision of the Court of Appeals should be reversed.

RESPECTFULLY SUBMITTED,



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APPENDICIES

APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FILED
JUL 10 1987
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT
(stamp)

No s. 86-6144, - 6164, - 6172

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the TENTH day of JULY one thousand nine hundred and eighty-seven.

Present:

HON. THOMAS J. MESKILL,

HON. AMALYA L. KEARSE,

HON. FRANK X. ALTIMARI,

Circuit Judges,

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

RICHARD JAMES FRENCH d/b/a NEILD CRUIKSHANK & Co.–PACIFIC; JOSE PASCUAL; HARRY C. POLONITZA & CO.; STEVEN S. MITCHELL and ALAN SCHMIDT,
French Plaintiffs-Appellees,

DAVID CHAN: OPEX INVESTMENTS INC.; RUDOLF M. BINNEWIES; WILLIAM A. CHARLES; SOLD INC.; MONTGOMERY AND MADER, N.A. MONTGOMERY; RICHARD E. MADER and CRAIG A. RESNICK,

Charles Plaintiffs-Appellees,

- v. -

CERTAIN UNKNOWN PURCHASERS OF THE COMMON STOCK OF AND CALL OPTIONS FOR THE COMMON STOCK OF SANTA FE INTERNATIONAL CORPORATION; CREDIT SUISSE; SWISS AMERICAN SECURITIES, INC.; CITIBANK, N.A.; LOMBARD, ODIER & CIR; MORGAN GUARANTY TRUST COMPANY OF NEW YORK; SWISS BANK CORPORATION; DREXEL DURNHAM LAMBERT, INC.; THE CHASE MANHATTAN BANK, N.A.; MOSELEY, HALLGARTEN, ESTABROOK & WEEDEN, INC; FAISAL AL MASSOUD AL FUHAID,

Defendants-Appellees,

- v.-

ALAN E. ZIMMER, JR., and JOHN OLAQUES,

Objectors-Appellants,

A petition for a rehearing having been filed herein by Objectors-Appellants ALAN E. ZIMMER, JR. and JOHN OLAGUES.

Upon consideration thereof, it is

Ordered that the said petition be and it hereby is DENIED.

s/s Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1986

Nos. 456, 608, 642

(Argued December 15, 1986 – Decided May 6, 1987)

Docket Nos. 86-6144, 86-6164, 86-6172

MAY 11 REC'D
(stamp)

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

RICHARD JAMES FRENCH d/b/a NEILD CRUIKSHANK & CO.–PACIFIC; JOSE PASCUAL; HARRY C. POLONITZA & CO.; STEVEN S. MITCHELL and ALAN SCHMIDT,
French Plaintiffs-Appellees,

DAVID CHAN; OPEX INVESTMENTS INC.; RUDOLF M. BINNEWIES; WILLIAM A. CHARLES; SOLD INC.; MONTGOMERY AND MADER, N.A. MONTGOMERY; RICHARD E. MADER and CRAIG A. RESNICK,
Charles Plaintiffs-Appellees,

v.

CERTAIN UNKNOWN PURCHASERS OF THE COMMON STOCK OF AND CALL OPTIONS FOR THE COMMON STOCK OF SANTA FE INTERNATIONAL CORPORATION;

CREDIT SUISSE; SWISS AMERICAN SECURITIES, INC.; CITIBANK, N.A.; LOMBARD, ODIER & CIR; MORGAN GUARANTY TRUST COMPANY OF NEW YORK; SWISS BANK CORPORATION; DREXEL BURNHAM LAMBERT, INC.; THE CHASE MANHATTAN BANK, N.A.; MOSELEY, HALLGARTEN, ESTABROOK & WEEDEN, INC.; FAISAL AL MASSOUD AL FUHAID,

Defendants-Appelles,

v.

ALAN E. ZIMMER, JR., and JOHN OLAQUES,

Objectors-Appellants.

B e f o r e: MESKILL, KEARSE and ALTIMARI, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Conner, *J.*, following an order approving a plan of settlement between various defendants and the Securities and Exchange Commission. The judgment denied the objections of two plaintiffs to the claims procedure adopted by the district court for the distribution of disgorged profits.

Affirmed.

ARTHUR M. HANDLER, New York City (Robert S. Goodman, Laura A. Larks, Golenbock and Barell, New York City, Charles R. Breyer, Joseph C. Spero, Coblentz, Cahen, McCabe & Breyer, San Francisco, California, of counsel),
for Objector-Appellant Zimmer.

GEORGE B. RECILE, Metairie, Louisiana,
for Objector-Appellant Olaques.

DANIEL L. GOELZER, General Counsel, Securities and Exchange Commission, Washington, D.C. (Paul Gonson, Solicitor, Jacob H. Stillman, Associate General Counsel, Rosalind C. Cohen, Assistant General Counsel, Sheila M. Barry, Securities and Exhange Commission, Washington, D.C., of counsel),
for Plaintiff-Appellee SEC.

HERBERT E. MILSTEIN, Washington, D.C. (Steven J. Toll, Patricia F. Bak, Cohen, Milstein & Hausfeld, Washington, D.C., Richard J. Kilsheimer, Kaplan, Kilsheimer & Foley, New York City, of counsel),
for French Plaintiffs-Appellees.

Marvin Wexler, Kornstein, Veisz and Wexler, New York City, Donald E. Schlotz, Armour, St. John, Wilcox, Goodin & Schlotz, Jon B. Sigerman, San Francisco, California, on the brief,
for Charles Plaintiffs-Appellees.

James D. St. Clair, J. Barry Morrissey, Thomas N. O'Connor, Hale and Dorr, Boston, Massachusetts, William K. Dodds, Olwine, Connoly, Chase, O'Donnel & Weyer, New York City, on the brief,
for Defendants-Appellees Unknown Purchasers.

MESKILL, *Circuit Judge*:

Objectors-appellants Alan E. Zimmer and John Olaques appeal from a final judgment of the United States District Court for the Southern District of New York, Conner, *J.*, denying with prejudice their objections to an order of the district court establishing a claims fund and claims procedure for the distribution of disgorged profits. On February 26,

1986, the district court entered an order approving a settlement among the Securities and Exchange Commission (SEC), various defendants who traded in Santa Fe International Corporation (Santa Fe) stock and call options on inside information, and injured plaintiffs who sold stock and call options to defendants. Zimmer and Olaques, claiming to be damaged as a result of defendants' activities, objected to the plan's proposed distribution of $7,841,844 in disgorged profits. The district court, however, found that the plan of settlement was fair in all respects. We affirm.

BACKGROUND

On October 26, 1981, the SEC filed an enforcement action in the United States District Court for the Southern District of New York alleging violations of section 10(b) of the Securities Exchange Act of 1934 (Act), 15 U.S.C. § 78j(b) (1982), and Rule 10b-5, 17 C.F.R. § 240.10b-5. The SEC alleged that certain unknown persons purchased Santa Fe stock and call options on inside information concerning a proposed merger between Santa Fe and Kuwait Petroleum Company. Apparently, defendants were aware that a merger offer would be made for all of the common stock of Santa Fe on October 5, 1981. Illegal trading in Santa Fe securities was alleged to have taken place from September 21 to October 1, 1981, otherwise known as the Window Period. The complaint filed by the SEC sought injunctions against future violations of the Act as well as disgorgement of illegal profits acquired during the Window Period. The district court entered a temporary restraining order on October 26, 1981, freezing all profits of defendants subject to disgorgement. This order was followed by a preliminary injunction, which continued the freeze until the case was settled on February 26, 1986.

While the SEC's enforcement action was pending in the Southern District, two groups of private investors brought

civil suits against defendants to recover damages based on the same illegal trading in Santa Fe securities. The first group of investors (French plaintiffs) commenced an action in the Southern District of New York. The second group (Charles plaintiffs) instituted their action in the United States District Court for the Northern District of California. Both actions were terminated when, in early February 1986, the SEC negotiated a settlement with defendants also settling the claims of the Charles and French plaintiffs. J. App. at 65-82. Disgorged profits were paid into a claims fund that was developed as part of the separate SEC enforcement action.

After individual defendants were identified in the SEC action, the parties agreed to a disgorgement of profits in the amount of $7.8 million. A plan of distribution was proposed that sought to recompense over 1,900 potential claimants. The plan, which concluded a year long series of negotiations, was submitted to the district court on a joint motion of the parties for final approval.

Under the proposed plan, two Claims Funds would be established and managed by a court appointed Master. Claims Fund A would provide funds for claims by option traders while Claims Fund B would satisfy the claims of those who traded in Santa Fe common stock. Claims Fund A was further divided into two subfunds. Subfund 1 represented the claims of those who sustained losses in direct options trades with defendants. Subfund 2 represented the claims of those who did not deal directly with defendants, but sustained losses as a result of options dealings during the Window Period. Only claimants who suffered actual out-of-pocket losses as a result of defendants' illegal trading would be permitted to sustain a claim under the plan. J. App. at 129.

The settling parties agreed upon the following distribution of the $7.8 million in disgorged profits. First, approximately $4.5 million would be allocated to Claims Fund A with $2

million earmarked for Subfund 1 and $2.5 million directed to Subfund 2. Second, the plan provided that $495,317 would be paid into Claims Fund B. All persons making claims under either Claims Fund would receive a *pro rata* share of the proceeds based on the size of their loss. Finally, a direct payment of $2.85 million would be made to the Charles and French plaintiffs as part of a separate settlement of their suits.

On June 13, 1986, the district court held a hearing "to consider any objections of any claimant to the claims procedure proposed by [the plan of settlement]." J. App. at 127-28. Objectors Olaques and Zimmer appeared at the hearing and urged Judge Conner to reject the plan. Both objectors argued that separate direct payments to the Charles and French plaintiffs were unwarranted and that, instead, the civil plaintiffs should be made to participate in the distribution on a *pro rata* basis. Olaques and Zimmer also argued that the plan's definition of "actual loss" unfairly excluded them from participation in the settlement. Judge Conner found that the settlement agreement was fair and reasonable, denied Olaques' and Zimmer's objections and entered an order approving the agreement. This appeal followed.

DISCUSSION

Section 27 of the Securities Exchange Act, 15 U.S.C. § 78aa (1982), confers general equity powers on district courts to remedy violations of the Act. *SEC* v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1103 (2d Cir. 1972); *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971). "Once the equity jurisdiction of the district court has been properly invoked by a showing of a securities law violation, the court possesses the necessary power to fashion an appropriate remedy." *Manor Nursing*, 458 F.2d at 1103. The disgorgement remedy approved by the district court in this case is, by its nature, an

equitable remedy. According to the Supreme Court, "[i]n shaping equity decrees, [a] trial court is vested with broad discretionary power; appellate review is correspondingly narrow." *Lemon* v. *Kurtzman*, 411 U.S. 192, 200 (1973). Therefore, we limit our review of Judge Conner's order approving the settlement to determining whether there was an abuse of discretion.

A. ***Zimmer's Claim***

Objector Zimmer claims that he was excluded from the fund because the entire settlement plan was wrongfully limited to compensation of claimants who sustained out-of-pocket losses.[1] On October 1, 1981, however, Zimmer still maintained a net profit in Santa Fe options despite a $1 million reduction in his profits during the Window Period. Therefore, he suffered no out-of-pocket losses as required by the plan. Nevertheless, Zimmer claims that any plan that fails to compensate investors for losses, of whatever character, violates the policy of the securities laws to protect investors. Zimmer asserts that Judge Conner abused his discretion by approving a plan of settlement that was not fair and equitable to all parties.

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1. Although Zimmer did not file a motion to intervene as a party to the district court action, he nevertheless has standing to appeal pursuant to *Hispanic Society of the New York City Police Department, Inc.* v. *New York City Police Department*, 806 F.2d 1147, 1152 (2d Cir. 1986). Here, the district court judgment may affect the ability of Zimmer to pursue his Rule 10b-5 claims against defendants. In *Elkind* v. *Liggett & Myers, Inc.*, 635 F.2d 156, 172 (2d Cir. 1980), we held that disgorgement of profits is the appropriate measure of damages in insider trading cases. Whether defendants' disgorgement under the settlement agreement in this case precludes Zimmer from maintaining a separate action for damages is a question that we need not, and do not, reach. For purposes of standing, it is sufficient to note that Zimmer asserts an interest that may be affected by the trial court's judgment.

Judge Conner did not abuse his discretion in approving the settlement agreement. The size of the disgorgement pool was limited. In total, Claims Fund A and B provided less than $5 million to recompense over 1,900 potential claimants. It is apparent that Judge Conner believed that the most grievously injured claimants should receive the greatest share of the fund. Unnecessary dilution of the pool was to be avoided. With this in mind, Judge Conner noted that certain plaintiffs were devastated by defendants' trading. Some were driven out of business entirely. J. App. at 242. Zimmer, on the other hand, "is a richer man today than if he had never bought or sold any Santa Fe options." J. App. at 249. Although Judge Conner acknowledged that other alternatives were practicable, he concluded: "I cannot fault the fairness of the SEC's policy decision to limit the benefits of the settlement fund to those who had an overall [l]oss. I think it's fair." J. App. at 248.

The equities clearly support Judge Conner's decision. Zimmer's claim of $1 million in damages would result in substantial dilution of the $5 million fund. Each claimant's *pro rata* share of disgorged profits would be significantly reduced if Zimmer's claims and others in his position were allowed. As an experienced market professional, Zimmer successfully employed hedging strategies to limit his exposure to loss. He is indeed fortunate to have suffered less than unsophisticated investors during the Window Period. It was not unreasonable for the agreement to compensate only those investors who suffered actual out-of-pocket losses. We conclude, therefore, that as to Zimmer the district court did not abuse its discretion in approving this agreement.

B. ***Olaques' Claims***

Olaques argued in the district court that he was harmed by defendant's non-disclosure of inside information because he held option contracts that remained "open" during the

Window Period when insider trading adversely affected the market. Judge Conner rejected Olaques' claim and also denied his motion to intervene as a party under Fed. R. Civ. P. 24(a). We affirm the denial of the motion to intervene and dismiss Olaques' appeal for lack of standing.

Generally, only a party to an action has standing to appeal. *Martin-Trigona* v. *Shiff*, 702 F.2d 380, 385 (2d Cir. 1983); 9 Moore's Federal Practice, ¶ 203.06 at 3-20 (2d ed. 1986). To intervene as a party under Rule 24(a), Olaques must show that he "claims an interest relating to the property or transaction which is the subject of the action." No such interest has been demonstrated.

Disgorgement of profits under the settlement agreement was based solely on defendants' potential Rule 10b-5 liability for insider trading during the Window Period. Olaques completed his transactions by September 21, 1981, and did not trade during the Window Period. Because Olaques was not induced by persons acting on inside information to purchase or sell securities during this period, he has no claim under Rule 10b-5 to the settlement fund and no "significantly protectable interest" in the litigation that might be impaired by the disposition of this case. *Donaldson* v. *United States*, 400 U.S. 517, 531 (1971). Therefore, the district court did not err in denying Olaques' motion to intervene and, because Olaques is not a party to this action, he lacks standing to challenge the settlement order on appeal.

C. ***Other Claims***

Zimmer claims that the settlement reached between the defendants and the Charles and French plaintiffs should be set aside. Zimmer contends that $2.8 million was taken from the disgorgement fund of over $7 million and paid directly to plaintiffs without the objectors' knowledge or consent. We do not reach the merits of Zimmer's claim in this regard,

however. Our conclusion that Zimmer is not entitled to participate in any part of the fund eliminates any interest Zimmer might have had in the funds to be paid to the Charles and French plaintiffs.

CONCLUSION

Judge Conner did not abuse his discretion in approving a complex settlement agreement designed to compensate over 1,900 investors in Santa Fe securities. Nothing prevented Zimmer and Olaques from bringing their own action against defendants, just as the French and Charles plaintiffs did. They should not expect to be able to stand aside and watch others incur the expenses of lengthy litigation and then upset the results of those efforts.

APPENDIX C

APPENDIX C

TRANSCRIPT OF HEARING
ON FEBRUARY 26, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civil 6553 (WCC)

JUN 12 1986
(stamp)

SECURITIES & EXCHANGE COMMISSION,
Plaintiff,

vs.

CERTAIN UNKNOWN PURCHASERS
OF THE COMMON STOCK OF AND
CALL OPTIONS FOR THE COMMON STOCK OF
SANTA FE INTERNATIONAL CORPORATION, et al.,
Defendants.

New York, N.Y.
February 26, 1986
10:00 a.m.

Before:

HON. WILLIAM C. CONNER,
District Judge

PRESENT:

MR. MANN
MR. STURC
MR. DODDS
MR. MORRISSEY
MR. ROSENBERG
MR. TOLL
MR. RUSSO

THE COURT: Who is represented here besides the SEC? Maybe you had better tell me.

MR. MORRISSEY: Your Honor, I am J. Barry Morrissey of Hale & Dorr, and I represent all of the defendants.

THE COURT: All right. Are there any of the other parties, for example, the bank defendants, who are present or represented here?

MR. RUSSO: I am Alan J. Russo of Fried, Frank, Harris, Shriver & Jacobson. We represent Credit Suisse and Swiss American Securities, Inc.

They are not parties to this action at this point. However, Swiss-American Securities is the holder of the frozen funds involved here.

MR. ROSENBERG: Eric Rosenberg, in-house counsel for Merrill Lynch. We are not involved in the action, but we are a stake holder in the funds frozen here.

MR. TOLL: I am Steven J. Toll, from Kohn, Milstein Cohen & Hausfeld, on behalf of the private option traders who have brought various lawsuits in New York and San Francisco.

THE COURT: That is the litigating traders?

MR. TOLL: That is correct.

MR. MANN: I am Michael Mann from the Securities & Exchange Commission.

MR. MORRISSEY: Your Honor, I would like to point out that I gave notice to all counsel for the nominal defendants. I have been in contact with counsel for Lumbard—of course, Mr. Russo represents Creduit Suisse—and one or two of the others. They did not seem to have any problem or any need to come to the meeting.

THE COURT: Is there anyone else representing the non-litigating investors who are going to be claimants against the funds?

I assume you are all familiar with the terms of the proposed order establishing the claims procedure. Is there anyone who objects to the entry of that order?

MR. MANN: Your Honor, we just would like to bring to your Honor's attention one issue which has come up in the last several hours with respect to the Court's order that has been placed before you today, and that is that Merrill Lynch, who is one of the fund holders, holding the funds for Faisal Massond al Fuhaid, is presently involved in litigation in Kuwait concerning the freeze of the assets which this Court ordered in October of 1981.

Merrill Lynch acted to freeze the assets as soon as your Honor ordered it, and we would ask the Court that your Honor take judicial notice and ask the Court in Kuwait to take judicial notice that Merrill Lynch had no choice but to freeze the assets which were in the Court's jurisdiction and has acted properly throught and freezing the assets.

THE COURT: I assume from that comment that they are being sued by the Kuwaiti depositor.

MR. MANN: That's correct.

MR. ROSENBERG: Yes, your Honor.

MR. MANN: And if your Honor's order is entered today, discouragement of the assets on behalf of the depositor would be appropriate.

THE COURT: All right. You will notify whoever is concerned that the banks and the brokerage firms acted pursuant to a court order and had no alternative.

MR. RUSSO: In terms of the disposal of the residue of the funds after paying out the specific settlement amounts under the order, there may be an issue as to the allocation of the residue among the customers of Creduit Suisse.

Now, Swiss American Securities here in New York has no records as to the beneficial owners of the funds, the residue. I assume that we will be able to work out this problem among counsel and that we won't need to be back to your Honor on this, but I felt I should mention it.

THE COURT: Well, I believe the order provides that the residue will be distributed as recommended and with the concurrence of the SEC, and I was just wondering what would happen if the SEC did not concur in the recommendation.

MR. MANN: I believe that provision that your Honor is referring to deals with the excess of any funds that are not distributed to claimants.

THE COURT: That is what I am talking about.

MR. MANN: And we believe we will able to come to some agreement about the proper distribution of those assets.

THE COURT: Well, I believe the order leaves it somewhat in doubt as to what would happen in case you are not able to agree.

MR. STURC: Your Honor, I think we are talking about two different things. Mr. Russo is referring to the distribution of certain moneys, primarily principal, pursuant to the instructions of Hale & Dorr, and Mr. Russo is saying that while the bottom line of the agreement refers to the distribution by Hale & Dorr pursuant to the agreement, it has no effect on the amount of money to be returned to the option holders.

I think Mr. Russo is saying as to the amount of money to be returned to the defendants, that is something he expects to work out within 24 hours.

MR. RUSSO: That is correct.

THE COURT: All right, but I still have this concern about the money left in the funds beyond that which is claimed, and if the SEC does not concur in the recommendation as to the disposition of the surplus, then I don't know what the Court is supposed to do.

I don't remember where that appears, but the language does require the concurrence of the SEC.

MR. MORRISSEY: Your Honor, the defendants would be willing to take it back, I assure you.

THE COURT: I am sure of that. I am sure the claimants would be happy to have it, and our library fund could use it, too.

MR. MANN: Your Honor, I believe it is at page 16, paragraph 14, six lines down.

THE COURT: Yes. That's it.

Well, I guess it is in the notice.

MR. MANN: That's Right.

THE COURT: The same language appears.

MR. MANN: We believe that that has the effect of giving the Court the discretion to determine where any balance would go and that it would only be upon the recommendation of the master. If no concurrence were reached, it would be within the Court's discretion, and obviously the master would make one recommendation and the SEC in that case would make another, and the Court would have the discretion to order it.

THE COURT: I am glad you made that clear on the record, because otherwise it was going to be the subject of controversy.

Perhaps it is too optimistic to think there will be any surplus left over after the claims.

All right. I take it there is no objection on the part of anyone present to the Court signing the order establishing the claim funds and the claims procedure.

MR. ROSENBERG: There was one technical change we had, your Honor, to conform to the present situation regarding the securities at Merrill Lynch.

MR. MANN: That's correct. That is written into your Honor's order. It appears on page 4 of the order, in No. 5.

We have learned today that the funds are not being held in the form of funds but rather securities, so the language was amended.

THE COURT: All right. I will initial that as well.

Now, I will sign the order. There are dates that need to be inserted, and I think we had better discuss those.

Does anyone have those flagged so we can go right to them?

MR. MANN: Yes, your Honor. All the dates appear in the exhibits to the documents, in the first exhibit, on page 4.

THE COURT: All right. That is the date of the hearing. There was a provision that that had to be 150 days after the order.

MR. MANN: This is a hearing to consider any objections, your Honor.

THE COURT: Oh, this is not the final?

MR. MANN: We have provided in the order for the master to have 60 days to mail out the notices, and not less than 45 days thereafter the Court is to hold a hearing, so that is a total of 105 days.

THE COURT: From today?

MR. MANN: From today.

THE COURT: I don't have a calendar with me. That would be three and a half months from today.

All right. June 19th would be slightly more than 105 days.

That is Friday. We will set it down for 2:00 o'clock on Friday, June 19.

MR. TOLL: Your Honor, I believe the 19th is a Thursday.

THE COURT: All right. June 20th.

MR. MANN: Your Honor, I have a conflict on June 20th.

THE COURT: Let's see if June 13th is 105 days.

Yes. That is 106 days from now. Friday, June 13th, then.

MR. MANN: At what time, your Honor?

THE COURT: 2:00 o'clock, in Room 618.

MR. MANN: The next page, your Honor, is page 14 of Exhibit 1, paragraphs 30 and 31.

THE COURT: All right. The Court's order is dated today, which is February 26th.

All right. The June 13th date goes in there, but it will be 2:00 p.m. instead of 10:00 a.m.

All right.

Now, the briefs in support of objections should be filed how much in advance of that hearing date?

MR. MANN: Your Honor, we would suggest two weeks, to give the Commission an opportunity to see them.

MR. STURC: Your Honor, that will be no later than May 30, 1986.

THE COURT: All right. Anyplace else where we have to put in dates?

MR. MANN: Yes, your Honor. On Exhibit 2.

THE COURT: All right. Well, I put that in already.

MR. MANN: That is today's date. In Exhibit 2, page 4, after–

THE COURT: Proof of claim and release. That is not what you are talking about?

MR. MANN: Following that, on page 4, paragraph 10.

THE COURT: Yes. That is the June 13th date.

I will add also there 2:00 p.m.

MR. MANN: On page 7, there is also a place to add the 2:00 p.m. That is page 7, paragraphs 21 and 22.

THE COURT: And today's date has to be inserted on page 6.

MR. MANN: I believe that is all, your Honor.

THE COURT: Have you any idea what the magnitude of the claims is likely to be?

MR. MANN: Your Honor, when we initiated this action we submitted some affidavits from those who had lost money. The largest was a total of $21 million.

Because the claims procedure provides that only those people who lost money as a result of the transactions may claim, we don't know what percentage of that will be claimed here.

However, we have had consultations with the private plaintiffs about this, and we believe that in terms of direct claims the funds should be adequate to compensate all of those losses.

THE COURT: Those private plaintiffs who have settled received what percent of their losses?

MR. MANN: I believe the private plaintiffs who are settling are receiving 100 percent of their losses in privity, where they were in privity with the defendants, and they would have the right to claim contemporaneous losses as well.

MR. TOLL: That is correct, your Honor, and we presume that all the direct traders will receive the 100 percent.

THE COURT: Well, I want to congratualte you and thank you very much for making this possible.

Is there anything else?

MR. MANN: There are consents and undertakings of final judgments for your Honor ot consider signing as well.

THE COURT: Well, I will do that. I won't keep you waiting while I do that.

(stamp)
(illegible)
s/s **Murray Padgery, Jr.**
U. S. District Court

APPENDIX D

APPENDIX D

ORDER ESTABLISHING A CLAIMS FUND AND CLAIMS PROCEDURE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 6553 (WCC)

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

CERTAIN UNKNOWN PURCHASERS OF THE COMMON STOCK OF, AND CALL OPTIONS FOR THE COMMON STOCK OF, SANTA FE INTERNATIONAL CORPORATION, *et al.*
Defendants.

U. S. DISTRICT COURT
FILED
FEB 26 1986
S. D. OF N. Y.
(stamp)

MICROFILM
FEB 26 1986
(stamp)

ORDER ESTABLISHING A CLAIMS FUND AND CLAIMS PROCEDURE

Upon motion made jointly by Costandi N. Nasser, H.R.H. McCulloch, Abdul Rahman Mannai, Shaikh Khalid Bin

Hamad al-Thani, Rachanal Foundation, Sonawel Anstalt, L. T. Al Swaidi and Faisal al Massoud al Fuhaid, defendants herein (hereinafter collectively "defendants"), and the United states Securities and Exchange Commission (hereinafter "SEC"), and certain options traders who claim to have suffered damages as a result of the defendants' purchase and sale of common stock and options contracts for the common stock of Santa Fe International Corporation ("Santa Fe"), and who have filed private civil actions against the defendants and others in the United States District Court for the Northern District of California, Civil Action Number C-84-6320 (WHO), and in the United States District Court for the Southern District of New York, Civil Action Number 84 Civ. 6811 (RLC) (hereinafter collectively "options traders"), and after hearing, IT IS HEREBY ORDERED THAT:

1. This court finds that the terms and conditions proposed by the parties to establish a claims fund and claims procedure are a good faith, fair and reasonable proposal to provide for a procedure pursuant to which persons or entities engaged in direct or contemporaneous trades in common stock and call options for the common stock of Santa Fe with defendants and who claim to have suffered actual losses may be fairly and justly compensated for their alleged losses.

2. Credit Suisse, Swiss America Securities, Inc., Lombard Odier & Cie, Morgan Guaranty Trust Company of New York, Merrill, Lynch, Pierce, Fenner & Smith, Inc., the Chase Manhattan Bank, N.A. Moseley, Hallgarten, Estabrook & Weeden, Inc. and John Horan, Esq. ("fund holders") are hereby ordered to release in strict compliance with the terms of this Order, and without any set-offs, charge-backs, adjustments, deductions or charges for fees or expenses of any kind or nature whatsoever, any and all funds which are held or which are frozen in accounts for the account of any of the defendants. Subject to full compliance with this Order, and unrestricted release of all of said funds in complete and strict compliance with this Order, the fund holders shall be relieved and discharged of and from any and all obligations

imposed upon them by any injunction or order entered by this Court relating to freezing the accounts of the defendants.

3. Within one day of the date of this Order, the fund holders are ordered to pay or cause to be paid all funds referred to in paragraph 2 above as specified in each of sub-paragraphs (a), (b), (c) and (e) below:

(a) The fund holders listed below shall pay or order to be paid a total of $2,8 million by Federal Express jointly to Herbert E. Milstein, Esq., and Armour, St. John, Wilcox, Goodin & Schlotz, at 1401 New York Avenue, N.W., Suite 600, Washington, D.C. 20005, as counsel for, and for the benefit of, the options traders. In order to make said $2.8 million payment, the fund holders listed below in this sub-paragraph shall pay or order to be paid the following amounts out of the funds held or frozen for the accounts of the defendants or of the fund holders listed below:

Costandi N. Nasser, for whom Morgan Guaranty Trust Company of New York presently holds funds in an account in the name of Lombard Odier & Cie ..... $ 177,497

H.R.H. McCulloch, for whom Moseley, Hallgarten, Estabook & Weeden, Inc. presently holds funds in an account in the name of Chase Manhattan Bank, N.A. 84,934

Abdul Rahman Mannai, for whom Morgan Guaranty Trust Company of New York presently holds funds in an account in the name of Lombard Odier & Cie 173,272

Rachanal Foundation, for which Swiss American Securities, Inc. presently holds funds in the name of Credit Suisse 1,631,254

Sonawel Anstalt, for which Swiss American Securities, Inc. presently holds funds in the name of Credit Suisse 237,689

L.T. Al Swaidi, for whom John Horan, Esquire, presently holds funds 212,421

Faisal al Massoud al Fuhaid, for whom Merrill Lynch Pierce Fenner & Smith, Inc. presently holds* securities which it shall liquidate 332,933

TOTAL $2,850,000

None of the foregoing payments shall be deemed to be attributable to either principal relating to the purchase of options, or to principal, profits or interest relating to or realized by the defendants on the purchase and sale of Santa Fe common stock.

(b) The fund holders listed below in this sub-paragraph shall pay or order to be paid the following amounts out of funds held or frozen for the accounts of the defendants or of the fund holders listed below into a single escrow account with Manufacturers Hanover Trust Co., Corporation Trust Department, 600 Fifth Avenue, New York, New York

* The word "funds" stricken out and penned in "securities which it shall liquidate", initialled (illegible).

10020, Attention: Joseph Conte. This account is denominated as the Santa Fe International Corporation Option Sellers Claims Fund A, A/C No. SE11416:

Costandi N. Nasser, for whom Morgan Guaranty Trust Company of New York presently holds funds in the name of Lombard Odier & Cie ... $ 280,228

H.R.H. McCulloch, for whom Moseley, Hallgarten Estabrook & Weeden, Inc. presently holds funds in an account in the name of Chase Manhattan Bank, N.A. 134,092

Abdul Rahman Mannai, for whom Morgan Guaranty Trust Company of New York presently holds funds in an account in the name of Lombard Odier & Cie 273,559

Rachanal Foundation, for which Swiss American Securities, Inc. presently holds funds in the name of Credit Suisse 2,575,395

Sonawel Anstalt, for which Swiss American Securities, Inc. presently holds funds in the name of Credit Suisse 375,259

L.T. Al Swaidi, for whom John Horan, Esquire, presently holds funds 335,366

Faisal al Massoud al Fuhaid, for whom Merrill Lynch Pierce Fenner & Smith, Inc. presently holds* securities which it shall liquidate 525,628

TOTAL $4,499,527

This escrow account shall be designated as Claims Fund A, shall be administered by a Master, as provided below, and shall be used as more particularly set forth below for payment of claims of those who sold call options for the common stock of Santa Fe and sustained actual and contemporaneous losses as defined below. Claims Fund A shall further be broken down into Sub-Fund No. 1 and Sub-Fund No. 2. Sub-Fund No. 1 represents the direct trading loss Sub-Fund and Sub-Fund No. 2 represents the contemporaneous trading loss Sub-Fund. Of the monies placed in Claims Fund A, $2.0 million shall be placed in Sub-Fund No. 1 and the balance of Claims Fund A shall be placed in Sub-Fund No. 2. If all of the funds in Sub-Fund No. 1 are not claimed, the balance remaining after distribution of Sub-Fund No. 1 shall be placed in Sub-Fund No. 2 for distribution to eligible claimants. Sub-Fund No. 1 shall be distributed in the manner set forth below to all claimants who: (a) sold Santa Fe call options directly to the defendants; and (b) incurred actual losses, as defined below, except that the options traders shall not be entitled to make claims on Sub-Fund No. 1. Sub-Fund No. 2 shall be distributed in the manner set forth below to all claimants who: (a) sold Santa Fe call options from September 22, 1981 through October 1, 1981; (b) incurred contemporaneous trading losses as a result of such transactions, as defined below; and (c) incurred actual losses, as defined below. If there are any unclaimed funds in Sub-Fund

* The word "funds" stricken out and penned in "securities which it shall liquidate", initialled (illegible).

No. 2, such unclaimed funds shall be paid as directed by the Court upon recommendation by the Master, with the concurrence of the SEC.

(c) The fund holders listed below in this subparagraph shall pay or order to be paid the following amounts out of funds held or frozen for the accounts of the defendants or of the fund holders listed below into a second, single escrow account with Manufacturers Hanover Trust Co., Corporation Trust Department, 600 Fifth Avenue, New York, New York 10020, Attention: Joseph Conte. This account is denominated as the Santa Fe International Corporation Common Stock Sellers Claims Fund B, A/C No. SE11417:

Defendant	Amount
Abdul Rahman Mannai, for whom Swiss American Securities, Inc. presently holds funds in an account in the name of Credit Suisse	$ 116,984
Shaikh Khalid al-Thani, for whom Swiss American Securities, Inc. presently holds funds in an account in the name of Credit Suisse	$ 375,333
TOTAL	$ 492,317

This second escrow account shall be designated Claims Fund B, shall be administered by a Master and shall be used as more particularly set forth below for payment of claims of those who had net stock sales (as that term is defined below) in common stock of Santa Fe for the period September 21, 1981 through September 23, 1981.

(d) The payment of the frozen funds into Claims Funds A and B on behalf of the defendants, as set forth in subparagraphs (b) and (c) above, and subject ot the Consents and Undertakings and Orders of Injunctions or Stipulations and Orders executed by the respective defendants and entered simultaneously with this Order, shall constitute satisfaction of any and all claims by the options traders and by the SEC against any of the defendants arising out of the purchase and sale of the purchase and sale of Santa Fe securities.

(e) As each fund holder pays or orders payment of amounts specified in subparagraphs (a) through (c) above, each fund holder shall simultaneously pay or order to be paid the entire balance remaining in the account of any defendant, or of any fund holder holding funds for the account of any defendant, without any set-offs, charge-backs, adjustments, deductions or charges for fees or expenses of any kind or nature whatsoever in strict compliance with written instructions received from Hale and Dorr, Boston, Massachusetts. Immediately after complying with said written instructions, each fund holder shall provide Hale and Door, Attention of J. B. Morrissey, Esq. and the SEC, Attention of Michael Mann, Esq., with written confirmation that it has complied with said written instructions, specifying the amounts paid or ordered to be paid per Hale and Dorr's instructions.

4. Only the funds released from the frozen accounts and paid into the escrow accounts pursuant to paragraphs 3(b) and 3(c) above shall be used to establish Claims Funds A and B and the designated sub-funds. All funds in Claims Funds A and B shall be continually invested for the benefit of the claimants in U.S. government securities or in certificates of deposits issued by national banks in the United States with assets of more than a billion dollars. Interest earned on these investments shall be added to the principal of Claims Funds A and B. The Master shall be responsible for the continual investment of these funds.

5. Irwin B. Schumer is hereby appointed as a Master who shall oversee, invest and disburse the Claims Funds. In the event the Master resigns or is otherwise unable to continue to function as Master, then the SEC and the option traders shall nominate one or more persons from whom this Court shall appoint a substitute Master who shall oversee, invest and dispurse the Claims Funds. The Master shall be authorized, if necessary or appropriate, to employ others to assist him or her in carrying out the duties and responsibilities of the Master as set forth in this Order. The Master shall review the claims of claimants to the Claims Funds and recommend to the Court the amounts of money to be paid to the claimants. Any claimant who claims to be aggrieved by any action taken by the Master may appeal directly to this Court by written motion upon notice to the SEC, the option traders' counsel and anyone who files a notice of appearance. The Master also shall make written status reports to this Court as and when he, she or this Court deems it necessary or appropriate.

6. Within 60 days of this Order, the Master shall use reasonable efforts to give written notice substantially in the form attached hereto as Exhibits I and II by first class mail to the sellers of call options for the common stock of Santa Fe from September 22, 1981 through October 1, 1981 and to sellers of Santa Fe common stock during the period from September 21, 1981 through September 23, 1981. The notice shall be mailed to all persons whose identity can be reasonably ascertained directly or indirectly from the records of the Pacific Coast Stock Exchange, the New York Stock Exchange and the transfer records of Santa Fe.

7. The Master shll give newspaper notice substantially in the form attached hereto as Exhibits III and IV to the sellers of call options for the common stock of Santa Fe from September 22, 1981 through October 1, 1981 and to sellers of Santa Fe common stock during the period

from September 21, 1981 through September 23, 1981. This newspaper notice shall be published once in the National Edition of the Wall Street Journal within 10 to 20 days after the mailing of the notices pursuant to paragraph 6 above.

8. No less than 45 days after the mailing of the notices pursuant to paragraph 6 above, this Court shall hold a hearing to consider any objections of any claimant to the claims procedure proposed by this Order. All claimants may appear at that hearing and oppose, if they desire, the proposed claims procedure. However, no claimant may appear at the hearing unless at least ten days before the hearing such claimant files written objections with the Court stating why the proposed claims procedure should not be finally approved by this Court. The claimant shall serve copies of such papers on the following:

John H. Sturc, Esquire
Michael D. Mann, Esquire
Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549

J. Barry Morrissey, Esq.
James D. St. Clair, Esq.
Hale and Dorr
60 State Street
Boston, Massachusetts 02109

Herbert E. Milstein, Esq.
Kohn, Milstein, Cohen & Hausfeld
1401 New York Ave., N.W., Suite 600
Washington, D.C. 20005

Jon B. Sigerman, Esq.
155 Sansome Street, Suite 800
San Francisco, California 94104

9. In determining the amount of losses on the claims submitted, and the issues relating to direct trading, reference shall be made to, among other things, the Pacific Stock Exchange matched trade records, answers to interrogatories relating to trades by the defendants, and (a) the closing and opening October 1, 1981 and October 6, 1981 prices for each Santa Fe option series traded between September 22, 1981 and October 1, 1981 and (b) the closing and opening October 1, 1981 and October 6, 1981 prices for Santa Fe common stock.

10. Claimants shall submit written proof, including the amounts thereof, of their actual losses sustained on direct trades with defendants in Santa Fe options, contemporaneous trading losses in Santa Fe options from September 22, 1981 through October 1, 1981, and contemporaneous trades in Santa Fe common stock from September 21, 1981 through September 23, 1981.

11. A claimant's "actual loss" as defined herein is computed as follows:

(a) For each call option series in which a claimant was net short as of the close of trading on October 1, 1981, a loss is calculated by multiplying the number of short contracts in each option series by the difference between the price in each series as of the opening of trading on October 6, 1981 and the close of trading on October 1, 1981;

(b) Similar calculations of gains shall be made for each call options series in which a claimant was net long as of the close of trading on October 1, 1981;

(c) A net call options loss shall be determined by adding all the net short call options series losses, and subtracting the sum of the net long call option series gains for

all options series in which the claimant was net long. Unless a claimant has a net call options loss, he shall not be eligible to receive a distribution from Sub-Fund No. 1 or Sub-Fund No. 2;

(d) Similar calculations shall be made for each put option series. The net put options loss or gain is determined by summing the put options losses from put option long positions held at the close of trading on October 1, 1981, and subtracting the sum of all put option short positions as of October 1, 1981. A claimant's net put options loss, if any, shall not be added to the net call options loss in determining a claimant's net options loss;

(e) A claimant's net options loss shall be determined by subtracting the net put options gain from the net call options loss;

(f) Unless a claimant has a net options loss he shall not be eligible to receive a distribution from Sub-Fund No. 1 or Sub-Fund No. 2. If a claimant has a net options loss, the amount of this loss shall be further offset by any long Santa Fe stock position as of the close of trading on October 1, 1981;

(g) The value of the offset for long stock holdings shall be the number of shares of stock held on October 1, 1981 multiplied by the difference in the Santa Fe opening common stock price on October 6, 1981 and the closing stock price on October 1, 1981; and

(h) A claimant's actual losses shall equal his net options loss diminished by the value of gains from long stockholdings. Unless the claimant has suffered actual losses, then the claimant shall not eligible to receive a distribution form Sub-Fund No. 1 or Sub-Fund No. 2. Any loss which was forgiven or reduced by any written or oral agreement,

or by reciept of funds resulting directly or indirectly from any SEC or private litigation relating to the purchase or sale of Santa Fe securities, shall be disclosed in writing to the Master and shall be subtracted from actual loss calculations to determine a claimant's final actual loss figure. Failure to disclose any such written or oral agreement or other receipt of funds may result in disqualifying the claimant from participating in the Claims Fund, notwithstanding that such claimant has signed a release and such release shall remain in force and effect, notwithstanding such disqualification.

12. In connection with claims made by claimants on Sub-Fund No. 1, and in addition to evidence establishing a claimant's actual losses, each claimant shall submit, if available, evidence showing his direct trading losses, which losses shall constitute his claim on Sub-Fund No. 1, except as limited below. Such losses shall be calculated by multiplying the number of direct trade Santa Fe call option contracts sold by a claimant to any of the defendants by the difference between the opening prices of each such option series on October 6, 1981 and the price at which each such option was sold. However, claims submitted on Sub-Fund No. 1 shall be no greater than a claimant's actual loss as defined in paragraph 11 above. All of the eligible claims submitted shall be totaled and, if they exceed the total amount of the funds in Sub-Fund No. 1, each claimant shall receive a pro rata portion of Sub-Fund No. 1 based on the amount of such claimant's eligible claims. If the eligible claims submitted on Sub-Fund No. 1 do not exceed the total funds available, then each claimant shall receive such claimant's entire direct trading claim. The balance of any monies remaining in Sub-Fund No. 1, after distribution to eligible claimants, shall be placed in Sub-Fund No. 2.

13. Claims made by claimants on Sub-Fund No. 2 will be a claimant's net contemporaneous trading losses from

September 22, 1981 through October 1, 1981, as defined below, except that each such claim shall be no greater than a claimant's actual loss, as defined in paragraph 11 above. Net contemporaneous trading losses shall be calculated as follows:

(a) For each Santa Fe call option series traded from September 22, 1981 through October 1, 1981, a claimant shall determine the number of Santa Fe call options sold minus the number of Santa Fe call options purchased. This number of contracts shall be multiplied by the difference between the opening prices for each call option series on October 6, 1981 and the closing prices on October 1, 1981. The total of the calculations shall be added together, and if greater than zero, shall constitute a claimant's contemporaneous call options trading loss. If the total is zero or less, a claimant shall not be eligible to receive a distribution from Sub-Fund No. 2;

(b) For each Santa Fe put option series traded from September 22, 1981 through October 1, 1981, a claimant shall determine the number of Santa Fe put options purchased minus the number of Santa Fe put options sold. This number shall be multiplied by the difference between the opening prices in each put option series on October 6, 1981 and the closing prices on October 1, 1981. The total of the calculations shall be added together, and if less than zero, that amount shall be subtracted from the total in subparagraph 13(a) to determine a claimant's net contemporaneous options trading loss. If the total is greater than zero, it shall not be added to the total in subparagraph 13(a);

(c) A claimant not sustaining a net contemporaneous options trading loss shall not be eligible to receive a distribution from Sub-Fund No. 2;

(d) If a claimant has a net contemporaneous options trading loss, that loss shall be further reduced, where appropriate, by any Santa Fe net contemporaneous stock gains during the period September 22, 1981 through October 1, 1981. Santa Fe net contemporaneous stock gains shall be the difference between the number of Santa Fe common shares purchased and sold during the period, and where this results in a net stock purchase, multiplying the net shares purchased by the difference in the Santa Fe opening stock price on October 6, 1981 and the closing stock price on October 1, 1981. A claimant's net contemporaneous options trading loss less any net contemporaneous stock gain shall be a claimant's net contemporaneous trading loss, which figure shall constitute a claimant's claim for purposes of calculating each claimant's entitlement to Sub-Fund No. 2, except as limited in subparagraph (c) above. If there is a net contemporaneous stock trading loss, that figure shall not be used to increase a claimant's net contemporaneous trading loss for purposes of their claim on Sub-Fund No. 2.

14. All claimants who have actual losses and net contemporaneous trading losses, as defined in paragraphs 10, 11 and 13 above; shall be allowed to make claims and participate in Sub-Fund No. 2, including the options traders. All eligible net contemporaneous trading claims shall be totaled and if the total claims are less than the total amount of funds in Sub-Fund No. 2, each claimant shall receive such claimant's net contemporaneous trading claim. The balance of Sub-Fund No. 2 shall be paid as directed by the Court, upon recommendations received from the Master, with the concurrence of the SEC. If the total claims are greater than the total amount of funds in Sub-Fund No. 2, each claimant shall receive a pro rata portion of the fund based on the total amount of money in the fund divided by the total eligible claims. In no event shall a claimant receive from Sub-Fund No. 1 or Sub-Fund No. 2, either individually or

in the aggregate, an amount greater than a claimant's actual loss as defined in paragraph 11 above.

15. To the extent that valid claims have been made on Sub-Fund No. 1, and those valid claims exceed the total amount of funds in Sub-Fund No. 1, the option traders' claims for purposes of Sub-Fund No. 2 shall be reduced dollar for dollar by the amount by which valid claims on Sub-Fund No. 1 exceed the total amount of funds in Sub-Fund No. 1. However, in no event shall this reduction exceed $500,000.00.

16. In connection with claims made on Claims Fund B, claimants shall submit evidence of their Santa Fe common stock purchases and sales from September 21, 1981 through September 23, 1981. Claims shall be calculated by obtaining the differences between the number of shares sold and the number of shares purchased during this period, and only where this results in a net stock sale during this period will a claimant be eligible to participarte in Claims Fund B. Claims Fund B shall be distributed pro rata based on the net stock sales made by claimants.

17. The following shall apply to all claims:

(a) All claims shall be filed within 150 days of this Order, unless the time for filing is extended by this Court for good cause shown;

(b) All claims are subject to review and rejection by the Master;

(c) All claims may be reviewed by any claimant during normal business hours at the office of the Master;

(d) The decision of the Master to approve or reject a claim may be appealed to this Court after notice to the

concerned claimant, John Sturc and Michael Mann at the SEC, Herbert E. Milstein, and Jon B. Sigerman, and any other claimant or counsel who has filed an appearance;

(e) As a precondition to filing any claim, a claimant shall execute a release which states in substance that the claimant releases and waives any claims against the defendants which relate to or arise out of the purchase or sale of Santa Fe common stock or call options for the common stock of Santa Fe. As part of this release, the claimant shall agree that the claims procedure is the claimant's sole and exclusive remedy with respect to any damage claimed to have been suffered by the claimant as a result of the defendants' purchase or sale of Santa Fe common stock and/or call options for the common stock of Santa Fe;

(f) Any claim asserted by a claimant shall be in writing and shall provide adequate documentary evidence, where available, to support each claim. The Master may require any claimant to submit additional information which the Master deems necessary or appropriate. Failure to comply with the Master's requests may result in denial of the claim with prejudice, or disqualification from participation in the claim procedure, or both. Such documentary evidence should include, without limitation, records showing:

(1) a claimant's net options positions for put and call options in Santa Fe as of the close of trading on October 1, 1981;

(2) a listing of all Santa Fe call options and put options purchased and sold from September 22, 1981 through October 1, 1981;

(3) the number of shares of Santa Fe common stock purchased or sold from September 21, 1981 through October 1, 1981; and

(4) the number of shares of Santa Fe common stock held as of the close of trading on October 1, 1981 (whether long or short).

18. Subsequent to the close of the claims period, and subject to the provision of paragraph 19 below, the Master may, after deducting his or her fees and costs (and those of his or his associates, if any) distribute all or part of the Claims Funds to the claimants. The Master's fees and costs shall be paid from the interest accumulating on Claims Funds A and B subsequent to the date of this Order. In the event such fees and costs of the Master exceed the amount of such accumulated interest, application shall be made to the Court for payment of such fees and costs out of Sub-Fund No. 2. All of the Master's fees and costs shall be approved in advance by this Court upon notice to the persons identified in paragraph 8 above.

19. At least 20 days prior to distributing all or part of the Claims Fund, the Master shall notify all then known claimants and this Court in writing of his or her intention to make such a distribution. Any objections to such distribution must be filed in writing five days before the date of such distribution, with notice to all claimants. The Master shall consider the objection(s) and notify the claimants in writing of his or her decision. The aggrieved claimant(s) shall have 21 days from the date this decision is sent to the claimant to file a written appeal to this court. Notwithstanding the lack of any objection, this Court shall hold a hearing to determine the manner in which the Claims Funds shall be distributed or paid by the Master.

20. Within 30 days after the distribution of all or part of the Claims Funds, the Master shall provide this Court with a written accounting. Copies of the accounting shall be sent by the Master to all parties to this action, and upon request, to any claimants.

21. This Court shall retain jurisdiction over this matter until such time as the Master's final accounting is approved by this Court.

Dated: Feb. 26, 1986 SO ORDERED:

s/s William C. Conner
William C. Conner
United States District Judge

EXHIBIT I

ORDER ESTABLISHING A CLAIMS FUND AND CLAIMS PROCEDURE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 6553 (WCC)

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

CERTAIN UNKNOWN PURCHASERS OF THE COMMON STOCK OF, AND CALL OPTIONS FOR THE COMMON STOCK OF, SANTA FE INTERNATIONAL CORPORATION, *et al.*
Defendants.

NOTICE OF DISGORGEMENT AND CLAIMS PROCEDURE

TO: ALL PERSONS WHO SOLD CALL OPTIONS FOR THE COMMON STOCK OF SANTA FE INTERNATIONAL CORPORATION FROM SEPTEMBER 22, 1981 THROUGH OCTOBER 1, 1981

1. The purpose of this Notice is to inform you of (i) the pendency of the above-entitled action (the "Action"); (ii) the proposed settlement of all claims asserted in the Action, including the disgorgement of profits and establishment of a Claims Fund and Claims Procedure; (iii) a hearing by the United States District Court for the Southern District of New York (the "Court") to consider any objections of any claimant to the Claims Procedure; and (iv) your ability to make a claim on the disgorged funds. PLEASE READ THIS ENTIRE NOTICE CAREFULLY.

Description of the Litigation

2. This Action was commenced by the Securities and Exchange Commission (hereinafter "SEC") on October 26, 1981. The present defendants in this Action are Costandi N. Nasser, H.R.H. McCulloch, Abdul Rahman Mannai, Shaikh Khalid Bin Hamad al-Thani, Rachanal Foundation, Sonawel Anstalt, L.T. A. Swaidi and Faisal al Massoud al Fuhaid.

3. In substance, the complaint alleges that the defendants engaged in illegal insider trading in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") in connection with their purchases of common stock and call options for the common stock of Santa Fe International Company ("Santa Fe"). The complaint seeks injunctive relief and disgorgement of the profits made by defendants on these transactions. Defendants deny the material allegations of the complaint, deny that they violated any provision of the securities laws, and deny that they engaged in any wrongful conduct whatsoever.

4. Other civil actions were filed against these defendants by certain option traders ("litigating option traders") who claimed to have suffered damages as a result of defendants' trading. Those actions similarly alleged violations of, among other things, Section 10(b) of the Exchange Act.

5. A settlement has been agreed to by the SEC and the defendants in which defendants have agreed to disgorge their profits in connection with such transactions. The defendants have also simultaneously settled the litigations brought by the litigating option traders.

THE SETTLEMENT AND CLAIMS PROCEDURE

6. After payment by the defendants to the litigating option traders from the disgorged profits, defendants shall cause $4,499,527.00 to be placed in an escrow account denominated as Claims Fund A. This escrow account shall be administered by a Court appointed Master, as provided below, and shall be used as more particularly set forth below for payment of claims of those who sold call options for the common stock of Santa Fe and sustained actual and contemporaneous losses as defined below.

7. Claims Fund A shall be broken down into Sub-Fund No. 1 and Sub-Fund No. 2. Sub-Fund No. 1 represents the direct trading loss Sub-Fund, and Sub-Fund No. 2 represents the contemporaneous trading loss Sub-Fund. Of the $4,499,527 placed in Claims Fund A, $2.0 million shall be placed in Sub-Fund No. 1 and the balance of Claims Fund A, $2,499,527, shall be placed in Sub-Fund No. 2.

8. If all of the funds in Sub-Fund No. 1 are not claimed, the balance remaining after distribution of Sub-Fund No. 1 shall be placed in Sub-Fund No. 2 for distribution to eligible claimants. Sub-Fund No. 1 shall be distributed in the manner set forth below to all claimants who: (a) sold Santa Fe call options directly to the defendants; and (b) incurred actual losses, as defined below, except that the litigating option traders shall not be entitled to make claims on Sub-Fund No. 1.

9. Sub-Fund No. 2 shall be distributed in the manner set forth below to all claimants who: (a) sold Santa Fe call options from September 22, 1981 through October 1, 1981; (b) incurred contemporaneous trading losses as a result of such transactions, as defined below; and (c) incurred actual

losses, as defined below. If there are any unclaimed funds in Sub-Fund No. 2, such unclaimed funds shall be paid as directed by the Court upon recommendation by the Master, with the concurrence of the SEC.

10. All Funds in Claims Fund A. shall be continually invested for the benefit of the claimants in U.S. government securities or in certificates of deposit issued by national banks in the United States with assets of more than a billion dollars. The Court appointed Master will be responsible for the continual investment of these funds. Interest earned on these funds shall be added to the principal of Claims Fund A and will be used initially (along with interest earned on another claims fund established for certain sellers of Santa Fe common stock), if not completely, to pay the fees and costs of the Master. If the Master's fees and costs exceed the amount of interest earned on the Claims Funds, application shall be made to the Court for payment of such fees and costs out of Sub-Fund No. 2.

11. The Master shall review the claims of claimants and recommend to the Court the amounts of money to be paid to the claimants. Any claimant who claims to be aggrieved by any action taken by the Master may appeal directly to this Court by written motion upon notice to the SEC, the litigating options traders' counsel and anyone who files a notice of appearance.

12. On June 13, 1986 at 2:00 p.m., this Court shall hold a hearing to consider any objections of any claimant to the claims procedure proposed by this Order. All claimants may appear at that hearing and oppose, if they desire, the proposed claims procedure. However, no claimant may appear at the hearing unless at least ten days before the hearing such claimant files written objections with the Court stating why

the proposed claims procedure should not be finally approved by this Court. The claimant shall serve copies of such papers on the following:

John H. Sturc, Esquire and
Michael D. Mann, Esquire
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

James D. St. Clair, Esquire
J. Barry Morrissey, P.C.
Hale and Dorr
60 State Street
Boston, Massachusetts 02109

Herbert E. Milstein, Esquire
Kohn, Milstein, Cohen & Hausfeld
1401 New York Avenue, N.W., Suite 600
Washington, D.C. 20005

Jon B. Sigerman, Esquire
155 Sansome Street, Suite 800
San Francisco, California 94104

13. Claimants shall submit written proof, including the amounts thereof, of their actual losses, sustained on direct trades with defendants in Santa Fe options, and contemporaneous trading losses in Santa Fe options from September 22, 1981 through October 1, 1981.

14. A claimant's "actual loss" as defined herein is computed as follows:

(a) For each call option series in which a claimant was net short as of the close of trading on October 1, 1981, a

loss is calculated by multiplying the number of short contracts in each option series by the difference between the price in each series as of the opening of trading on October 6, 1981 and the close of trading on October 1, 1981;

(b) Similar calculations of gains shall be made for each call options series in which a claimant was net long as of the close of trading on October 1, 1981;

(c) A net call options loss shall be determined by adding all the net short call options series losses, and subtracting the sum of the net long call option series gains for all options series in which the claimant was net long. Unless a claimant has a net call options loss, he shall not be eligible to receive a distribution from Sub-Fund No. 1 or Sub-Fund No. 2;

(d) Similar calculations shall be made for each put option series. The net put options loss is determined by summing the put options losses from put option long positions held at the close of trading on October 1, 1981, and subtracting the sum of all put option gains from put option short positions as of October 1, 1981. A claimant's net put options loss, if any, shall not be added to the net call options loss in determining a claimant's net options loss;

(e) A claimant's net options loss shall be determined by subtracting the net put options gains from the net call options loss;

(f) Unless a claimant has a net options loss he shall not be eligible to receive a distribution from Sub-Fund No. 1 or Sub-Fund No. 2. If a claimant has a net options loss, the amount of this loss shall be further offset by any long Santa Fe stock position as of the close of trading on October 1, 1981;

(g) The value of the offset for long stock holdings shall be the number of shares of stock held on October 1, 1981 multiplied by the difference in the Santa Fe opening common stock price on October 6, 1981 and the closing stock price on October 1, 1981; and

(h) A claimant's actual losses shall equal his net options loss diminished by the value of gains from long stockholdings. Unless the claimant has suffered actual losses, then the claimant shall not be eligible to receive a distribution from Sub-Fund No. 1 or Sub-Fund No. 2. Any loss which was forgiven or reduced by any written or oral argument, or by receipt of funds resulting directly or indirectly from any SEC or private litigation relating to the purchase or sale of Santa Fe securities, shall be disclosed in writing to the Master and shall be subtracted from actual loss calculations to determine a claimant's final actual loss figure. Failure to disclose any such written or oral argument or other receipt of funds, may result in disqualifying the claimant from participating in the Claims Fund, notwithstanding that such claimant has signed a release and such release shall remain in force and effect, notwithstanding such disqualification.

15. In connection with claims made by claimants on Sub-Fund No. 1, and in addition to evidence establishing a claimant's actual losses, each claimant shall submit, if available, evidence showing his direct trading losses, which losses shall constitute his claim on Sub-Fund No. 1, except as limited below. Such losses shall be calculated by multiplying the number of direct trade Santa Fe call option contracts sold by a claimant to any of the defendants by the difference between the opening prices of each such option series on October 6, 1981 and the price at which each such option was sold. Since claimants will not know if they

traded directly with a defendant, claimants must submit as much evidence as available about their sales of call option contracts, and the Master will determine from the records available to him if claimants traded directly with defendants and the amount of such loss.

16. Claims submitted on Sub-Fund No. 1 shall be no greater than a claimant's actual loss as defined in paragraph 14 above. All of the eligible claims submitted shall be totaled and, if they exceed the total amount of the funds in Sub-Fund no. 1, each claimant shall receive a pro rata portion of Sub-Fund No. 1 based on the amount of such claimant's eligible claims. If the eligible claims submitted on Sub-Fund No. 1 do not exceed the total funds available, then each claimant shall receive such claimant's entire direct trading claim. The balance of any monies remaining in Sub-Fund No. 1, after distribution to eligible claimants, shall be placed in Sub-Fund No. 2.

17. Claims made by claimants on Sub-Fund No. 2 will be a claimant's net contemporaneous trading losses from September 22, 1981 through October 1, 1981, as defined below, except that each such claim shall be no greater than a claimant's actual loss, as defined in paragraph 14 above. Net contemporaneous trading losses shall be calculated as follows:

(a) For each Santa Fe call option series traded from September 22, 1981 through October 1, 1981, the number of Santa Fe call options sold minus the number of Santa Fe call options purchased shall be multiplied by the difference between the opening prices for each call option series on October 6, 1981 and the closing prices on October 1, 1981. The total of the calculations shall be added together, and if greater than zero, shall constitute a claimant's contemporaneous call options trading loss. If the total is zero or less, a claimant shall not be eligible to receive a distribution from Sub-Fund No. 2;

(b) For each Santa Fe put option series traded from September 22, 1981 through October 1, 1981, the number of Santa Fe put options purchased minus the number of Santa Fe put options sold shall be multiplied by the difference between the opening prices in each put option series on October 6, 1981 and the closing prices on October 1, 1981. The total of the calculations shall be added together, and if less than zero, that amount shall be subtracted from the total in subparagraph 17(a) to determine a claimant's net contemporaneous options trading loss. If the total is greater than zero, it shall not be added to the total in subparagraph 17(a);

(c) A claimant not sustaining a net contemporaneous options trading loss shall not be eligible to receive a distribution from Sub-Fund No. 2;

(d) If a claimant has a net contemporaneous options trading loss, that loss shall be further reduced, where appropriate, by any Sant Fe net contemporaneous stock gains during the period September 22, 1981 through October 1, 1981. Santa Fe net contemporaneous stock gains shall be the difference between the number of Santa Fe common shares purchased and sold during the period, and where this results in a net stock purchase, multiplying the net shares purchased by the difference in the Santa Fe opening stock price on October 6, 1981 and the closing stock price on October 1, 1981. A claimant's net contemporaneous options trading loss, less any net contemporaneous stock gain shall be a claimant's net contemporaneous trading loss, which figure shall constitute a claimant's claim for purposes of calculating each claimant's entitlement to Sub-Fund No. 2, except as limited in sub-paragraph (c) above. If there is a net stock contemporaneous trading loss, that figure shall not be used to increase a claimant's net contemporaneous trading loss for purposes of their claim on Sub-Fund No. 2.

18. All claimants who have actual losses and net contemporaneous trading losses, as defined above, shall be allowed to make claims and participate in Sub-Fund No. 2, including the litigating option traders. All eligible net contemporaneous trading claims shall be totaled and if the total claims are less than the total amount of funds in Sub-Fund No. 2, each claimant shall receive such claimant's net contemporaneous trading claim. The balance of Sub-Fund No. 2 shall be paid as directed by the Court, upon recommendations received from the Master, with the concurrence of the SEC. If the total claims are greater than the total amount of funds in Sub-Fund No. 2, each claimant shall receive a pro rata portion of the fund based on the total amount of money in the fund divided by the total eligible claims. In no event shall a claimant receive from Sub-Fund No. 1 or Sub-Fund No. 2, either individually or in the aggregate, an amount greater than a claimant's actual loss as defined in paragraph 14 above.

19. To the extent that valid claims have been made on Sub-Fund No. 1, and those valid claims exceed the total amount of funds in Sub-Fund No. 1, the claims of the litigating option traders, for purposes of Sub-Fund No. 2, shall be reduced dollar for dollar by the amount by which valid claims on Sub-Fund No. 1 exceed the total amount of funds in Sub-Fund No. 1. However, in no event shall this reduction exceed $500,000.00.

20. All claims shall be filed by July 28, 1986, unless the time for filing is extended by the Court for good cause shown.

21. All claims are subject to review and rejection by the Master.

22. All claims may be reviewed by any claimant during normal business hours at the office of the Master.

23. The decision of the Master to approve or reject a claim may be appealed to this Court after notice to John Sturc and Michael Mann at the SEC, Herbert E. Milstein and Jon B. Sigerman, and any other claimant or counsel who has filed an appearance.

24. As a precondition to filing any claim, a claimant shall execute a release which states in substance that the claimant releases and waives any claims against the defendants which relate to or arise out of the purchase or sale of Santa Fe common stock or call options for the common stock of Santa Fe. As part of this release, the claimant shall agree that the claims procedure is the claimant's sole and exclusive remedy with respect to any damage claimed to have been suffered by the claimant as a result of the defendants' purchase or sale of Santa Fe common stock and/or call options for the common stock of Santa Fe.

25. Any claim asserted by a claimant shall be in writing and shall provide adequate documentary evidence, where available, to support each claim. The Master may require any claimant to submit additional information which the Master deems necessary or appropriate. Failure to comply with the Master's requests may result in denial of the claim with prejudice, or disqualification from participation in the claim procedure, or both. Such documentary evidence should include, without limitation, records showing:

(1) a claimant's net options positions for put and call options in Santa Fe as of the close of trading on October 1, 1981;

(2) a listing of all Santa Fe call options and put options purchased and sold from September 22, 1981 through October 1, 1981;

(3) the number of shares of Santa Fe common stock purchased or sold from September 21, 1981 through October 1, 1981; and

(4) the number of shares of Santa Fe common stock held as of the close of trading on October 1, 1981 (whether long or short).

26. At least 20 days prior to distributing all or part of the Claims Fund, the Master shall notify all then known claimants and this Court in writing of his intention to make such a distribution. Any objections to such distribution must be filed in writing five days before the date for such distribution, with notice to all claimants. The Master shall consider the objection(s) and notify the claimants in writing of his decision. The aggrieved claimant(s) shall have 21 days from the date the decision is sent to the claimant to file a written appeal to this Court. Notwithstanding the lack of any objection, the Court shall hold a hearing to determine the manner in which the Claims Funds shall be distributed or paid by the Master.

PROOF OF CLAIM AND RELEASE

27. To participate in the distribution of the Claims Fund, you are required to file on or before July 28, 1986, a Proof of Claim and Release, signed under oath, in the form annexed to this Notice, supported by such documents as are called for in the Proof of Claim and Release.

28. Execution and filing of the Proof of Claim and Release constitutes a complete and final release by the claimant of any and all claims against the defendants which relate to or arise out of the purchase or sale of Santa Fe common stock or call options.

29. Any person who fails to file a Proof of Claim and Release within the time provided, will be precluded from receiving any payment from the Claims Fund, unless the time for filing is extended by the Court for good cause shown.

NOTICE OF HEARING ON ANY OBJECTIONS TO CLAIMS PROCEDURE

30. Pursuant to the Court's Order dated Feb. 26, 1986, notice is hereby given that a hearing will be held on Friday, June 13, 1986, at 2:00 p.m. in Courtroom 618, at the United States Courthouse, Foley Square, New York, for the purpose of considering any objections of any claimant to the claims procedure set forth in this Notice.

31. Any claimant may appear at the Hearing either in person or by counsel, and oppose the claims procedure. However, no person shall be heard unless his objection is made in writing and filed with the Court, together with all supporting papers and briefs, no later than May 30, 1986, with proof of service of such papers on all those persons identified in paragraph 12 above.

BROKERS AND FINANCIAL INSTITUTIONS

32. Brokers and others who, as record but not beneficial owners, sold Santa Fe call options during the period September 22, 1981 through October 1, 1981, inclusive, have been requested by the Court to forward this Notice and the annexed Proof of Claim and Release to the persons who were the beneficial owners of the Santa Fe call options described above.

PLEASE DO NOT CALL OR WRITE TO THE COURT OR THE CLERK.

Dated: New York, New York

Feb. 26, 1986

BY ORDER OF THE COURT
The Honorable William C. Conner

ORDER ESTABLISHING A CLAIMS FUND AND CLAIMS PROCEDURE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 6553 (WCC)

PROOF OF CLAIM AND RELEASE

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

CERTAIN UNKNOWN PURCHASERS OF THE COMMON STOCK OF, AND CALL OPTIONS FOR THE COMMON STOCK OF, SANTA FE INTERNATIONAL CORPORATION, *et al.*
Defendants.

IMPORTANT INSTRUCTIONS

THIS PROOF OF CLAIM AND RELEASE MUST BE TIMELY SUBMITTED BY JULY 28, 1986 IN ORDER FOR YOU TO PARTICIPATE IN THE CLAIMS FUND DESCRIBED IN THE ACCOMPANYING NOTICE

1. You must be a person or entity who sold call options of Santa Fe International Corporation from September 22, 1981 through October 1, 1981, and sustained actual and/or contemporaneous losses as defined in the accompanying Notice.

2. YOU MUST FULLY COMPLETE AND SIGN AND SWEAR TO OR AFFIRM THIS PROOF OF CLAIM AND RELEASE BEFORE A NOTARY PUBLIC.

3. You must attach to your proof of claim originals or copies of brokers's confirmations, or monthly statements, or tax returns, or daily position or trading summaries, or other documents showing your sales and purchases of Santa Fe common stock and put and call options during the relevant period as described in the accompanying Notice.

4. YOUR PROOF OF CLAIM MUST BE FILED NO LATER THAN July 28, 1986 WITH THE MASTER, IRWIN B. SCHUMER OF BUCHBINDER, STEIN, TUNICK & PLATKIN, ADDRESSED TO:

Irwin B. Schumer, C.P.A.
Buchbinder, Stein, Tunick & Platkin
One Pennsylvania Plaza
New York, New York 10119

Re: Santa Fe Securities Litigation

A proof of claim shall be deemed filed (i) when posted, if it is mailed to the Master at the above address by first class, registered or certified mail, postage pre-paid, or (ii) if otherwise, sent, when it is actually received by the Master.

5. If you have any questions concerning the Notice or this Proof of Claim and Release, you may write to the Master, at the address provided in paragraph 4 above.

NOTICE TO BROKERS AND OTHER NON-BENEFICIAL OWNERS

The Court has requested that all brokerage concerns and other persons who, of record but not beneficially, sold Santa Fe call options during the period September 22, 1981 through October 1, 1981, inclusive, forward a copy of this Proof of Claim and Release to the persons who were the

beneficial owners of the Santa Fe call options described above. Additional copies of this Notice, and of the Proof of Claim and Release, can be obtained from the Master, addressed as follows:

Irwin B. Schumer, C.P.A.
Buchbinder, Stein, Tunick & Platkin
One Pennsylvania Plaza
New York, New York 10119

Re: Santa Fe Securities Litigation

STATEMENT OF CLAIM

I. PURCHASES/SALES OF SANTA FE CALL OPTIONS

During the period from September 22, 1981 through October 1, 1981, I made the following purchases and sales of Santa Fe call options:

Purch. (P) or Sale (S)	Trade Date	No. of Call Options Purchased/ Sold	Price of Option	Strik. Price/ Expiration Date	Gross Purchase/ Sales Price	Name of Broker
_____	_____	_____	$_____	_____	$_____	_____
_____	_____	_____	$_____	_____	$_____	_____
_____	_____	_____	$_____	_____	$_____	_____
_____	_____	_____	$_____	_____	$_____	_____
_____	_____	_____	$_____	_____	$_____	_____
_____	_____	_____	$_____	_____	$_____	_____
_____	_____	_____	$_____	_____	$_____	_____
_____	_____	_____	$_____	_____	$_____	_____
_____	_____	_____	$_____	_____	$_____	_____
_____	_____	_____	$_____	_____	$_____	_____

IF YOU ARE A TRADING FIRM OR MARKET MARKER, YOU MUST IDENTIFY YOUR PSE ACRONYM IN SEPTEMBER 1981.

YOU MAY ATTACH DETAILED RECORDS OR DOCUMENTATION IN LIEU OF FILLING OUT THE INFORMATION IN THE SPACES PROVIDED ABOVE AS LONG AS THE MATERIAL CONTAINS THE INFORMATION REQUESTED ABOVE.

II. PURCHASES/SALES OF SANTA FE PUT OPTIONS

During the period from September 22, 1981 through October 1, 1981, I made the following purchases and sales of Santa Fe put options.

Purchase (P) or Sale(S)	Trade Date	No. of Put Options Purchased/ Sold	Price of Option	Striking Price/ Expiration Date	Gross Purchase/ Sales Price
_____	_____	_____	$_____	_____	$_____
_____	_____	_____	$_____	_____	$_____
_____	_____	_____	$_____	_____	$_____
_____	_____	_____	$_____	_____	$_____
_____	_____	_____	$_____	_____	$_____
_____	_____	_____	$_____	_____	$_____
_____	_____	_____	$_____	_____	$_____
_____	_____	_____	$_____	_____	$_____
_____	_____	_____	$_____	_____	$_____
_____	_____	_____	$_____	_____	$_____

YOU MAY ATTACH DETAILED RECORDS OR DOCUMENTATION IN LIEU OF FILLING OUT THE INFORMATION IN THE SPACES PROVIDED ABOVE AS LONG AS THE MATERIAL CONTAINS THE INFORMATION REQUESTED ABOVE.

III. PURCHASES/SALES OF SANTA FE COMMON STOCK

During the period from September 22, 1981 through October 1, 1981 I made the following purchases/sales of Santa Fe common stock:

Purchase (P) or Sale (S)	Trade Date	No. of Shares Purchased/ Sold	Price of Stock Purchased/ Sold	Gross Purchase/ Sales Price
_____	_____	_____	$_____	$_____
_____	_____	_____	$_____	$_____
_____	_____	_____	$_____	$_____
_____	_____	_____	$_____	$_____
_____	_____	_____	$_____	$_____
_____	_____	_____	$_____	$_____
_____	_____	_____	$_____	$_____
_____	_____	_____	$_____	$_____
_____	_____	_____	$_____	$_____
_____	_____	_____	$_____	$_____

YOU MAY ATTACH DETAILED RECORDS OR DOCUMENTATION IN LIEU OF FILLING OUT THE INFORMATION IN THE SPACES PROVIDED ABOVE AS LONG AS THE MATERIAL CONTAINS THE INFORMATION REQUESTED ABOVE.

IV. As of the close of trading on October 1, 1981, I had the following net options positions for Santa Fe call and put options:

	Mark with "X" Where Appropriate	**How Many**	**State the Series**
Long Calls	[ ]		
Short Calls	[ ]		
Long Puts	[ ]		
Short Puts	[ ]		

V. As of the Close of trading on October 1, 1981 I held the following number of shares of Santa Fe common stock.

	Mark with "X" Where Appropriate	**How Many**
Long Stock	[ ]	
Short Stock	[ ]	

YOU MUST ATTACH COPIES OF BROKERAGE CONFIRMATIONS, MONTHLY STATEMENTS, TAX RETURNS, DAILY POSITION OR TRADING SUMMARIES OR OTHER DOCUMENTS THAT SUPPORT YOUR CLAIM.

PLEASE TYPE OR PRINT THE FOLLOWING INFORMATION:

1. Claimant's Name _____

2. Claimant's Address: _____
Street

_____
City State Zip Code

3. Claimant's Tel. No: _____
(Area Code)

4. Claimant's Capacity
(Owner, Agent, Executor
Successor): _____

RELEASE

I UNDERSTAND THAT BY FILING THIS PROOF OF CLAIM I HEREBY RELEASE THE DEFENDANTS IN THIS ACTION, OF AND FROM ANY AND ALL DEBTS, DEMANDS, ACTIONS, CAUSES OF ACTION, SUITS, ACCOUNTS, COVENANTS, FIDUCIARY DUTIES, CONTRACTS, CONTROVERSIES, AGREEMENTS, PROMISES, OMISSIONS, NEGLIGENCE, INTENTIONAL WRONGDOING, VIOLATIONS, DAMAGES AND LIABILITIES OF WHATEVER KIND OR NATURE, IN LAW OR EQUITY OR OTHERWISE, WHETHER NOW KNOWN OR UNKNOWN, SUSPECTED OR UNSUSPECTED, CLAIMED OR UNCLAIMED, AND WHETHER OR NOT CONCEALED OR HIDDEN, WHICH I NOW HAVE, MAY HAVE OR COULD HAVE OR WHICH I NOW OWN OR HOLD OR AT ANY TIME HERETOFORE OWNED OR HELD AS AGAINST ANY PERSON OR ENTITY BEING RELEASED HEREIN, INCLUDING, WITHOUT LIMITATION, ANY AND ALL CLAIMS, DEMANDS, OBLIGATIONS, CAUSES OF ACTION OR LIABILITIES WHICH IN ANY WAY RELATE TO OR ARISE OUT OF EITHER THE PURCHASE OR SALE OF SECURITIES OF SANTA FE INTERNATIONAL CORPORATION.

AS A PART OF THE CONSIDERATION HEREIN, IT IS MY INTENTION IN EXECUTING THIS GENERAL RELEASE THAT THE SAME SHALL CONSTITUTE A FULL

AND EFFECTIVE RELEASE IN ACCORDANCE WITH ITS TERMS; AND IN FUTHERANCE OF THIS INTENTION, I HEREBY EXPRESSLY WAIVE ANY AND ALL RIGHTS CONFERRED UPON ME, IF ANY, BY THE PROVISIONS OF STATUTES, SUCH AS SECTION 1542 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA, WHICH PROVIDES:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

I SWEAR THAT THE FOREGOING STATEMENTS ARE TRUE, CORRECT AND COMPLETE, UNDER THE PENALTIES OF PERJURY.

_____

Claimant's Signature

Sworn to before me this _____
day of _____ 1986.

_____

Notary Public

(Seal or Stamp)

ORDER ESTABLISHING A CLAIMS FUND AND CLAIMS PROCEDURE

EXHIBIT II

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 6553 (WCC)

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff

v.

CERTAIN UNKNOWN PURCHASERS OF THE COMMON STOCK OF, AND CALL OPTIONS FOR THE COMMON STOCK OF, SANTA FE INTERNATIONAL CORPORATION, *et al.*
Defendants.

NOTICE OF DISGORGEMENT AND CLAIMS PROCEDURE

TO: ALL PERSONS WHO SOLD COMMON STOCK OF SANTA FE INTERNATIONAL CORPORATION FROM SEPTEMBER 21, 1981 THROUGH SEPTEMBER 23, 1981

1. The purpose of this Notice is to inform you of (i) the pendency of the above-entitled action (the "Action"); (ii) the proposed settlement of all claims asserted in the Action, including the disgorgement of profits and establishment of a Claims Fund and Claims Procedure; (iii) a hearing by the United States District Court for the Southern District of New York (the "Court") to consider any objections of any

claimant to the Claims Procedure; and (iv) your ability to make a claim on the disgorged funds. PLEASE READ THIS ENTIRE NOTICE CAREFULLY.

Description of the Litigation

2. This Action was commenced by the Securities and Exchange Commission (hereinafter "SEC") on October 26, 1981. The present defendants in this Action are Costandi N. Nasser, H.R.H. McCulloch, Abdul Rahman Mannai, Shaikh Khalid Bin Hamad al-Thani, Rachanal Foundation, Sonawel Anstalt, L.T. Al Swaidi and Faisal al Massoud al Fuhaid.

3. In substance, the complaint alleges that the defendants engaged in illegal insider trading in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") in connection with their purchases of common stock and call options for the common stock of Santa Fe International Company ("Santa Fe"). The complaint seeks injunctive relief and disgorgement of the profits made by defendants on these transactions. Defendants deny the material allegations of the complaint, deny that they violated any provision of the securities laws, and deny that they engaged in any wrongful conduct whatsoever.

4. Other civil actions were filed against these defendants by certain option traders ("litigating option traders") who claimed to have suffered damages as a result of defendants' trading. Those actions similarly alleged violations of, among other things, Section 10(b) of the Exchange Act.

5. A settlement has been agreed to by the SEC and the defendants in which defendants have agreed to disgorge their profits in connection with such transactions. The defendants have also simultaneously settled the litigations brought by the litigating option traders.

THE SETTLEMENT AND CLAIMS PROCEDURE

6. After payment by the defendants to the litigating option traders from the disgorged profits, defendants shall cause $492,317.00 to be placed in an escrow account denominated as Claims Fund B. This escrow account shall be administered by a Court appointed Master, as provided below, and shall be used as more particularly set forth below for payment of claims of those who had net stock sales (as that term is defined below) in common stock of Santa Fe for the period September 21, 1981 through September 23, 1981.

7. In connection with claims made on Claims Fund B, claimants shall submit evidence of their Santa Fe common stock purchases and sales from September 21, 1981 through September 23, 1981. Claims shall be calculated by obtaining the differences between the number of shares sold and the number of shares purchased during this period, and only where this results in a net stock sale during this period will a claimant be eligible to participate in Claims Fund B. Claims Fund B shall be distributed pro rata based on the net stock sales made by claimants.

8. All funds in Claims Fund B shall be continually invested for the benefit of the claimants in U.S. government securities or in certificates of deposit issued by national banks in the United States with assets of more than a billion dollars. The Court appointed Master will be responsible for the continual investment of these funds. Interest earned on these funds shall be added to the principal of Claims Fund B and will be used initially (along with interest earned on another claims fund established for certain persons who transacted in Santa Fe options), if not completely, to pay the fees and costs of the Master. If the Master's fees and costs exceed the amount of interest earned on these claims funds, application shall be made to the Court for payment of such fees and costs out of the other claims fund.

9. The Master shall review the claims of claimants and recommend to the Court the amounts of money to be paid to the claimants. Any claimant who claims to be aggrieved by any action taken by the Master may appeal directly to this Court by written motion upon notice to the SEC, the litigating option traders' counsel and anyone who files a notice of appearance.

10. On June 13, 1986, at 2:00 p.m. this Court shall hold a hearing to consider any objections of any claimant to the claims procedure proposed by this Order. All claimants may appear at that hearing and oppose, if they desire, the proposed claims procedure. However, no claimant may appear at the hearing unless at least ten days before the hearing such claimant files written objections with the Court stating why the proposed claims procedure should not be finally approved by this Court. The claimant shall serve copies of such papers on the following:

John H. Sturc, Esquire and
Michael D. Mann, Esquire
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

James D. St. Clair, Esquire
J. Barry Morrissey, P.C.
Hale and Dorr
60 State Street
Boston, Massachusetts 02109

Herbert E. Milstein, Esquire
Kohn, Milstein, Cohen & Hausfeld
1401 New York Avenue, N.W., Suite 600
Washington, D.C. 20005

Jon B. Sigerman, Esquire
155 Sansome Street, Suite 800
San Francisco, California 94104

11. All claims shall be filed by July 28, 1986, unless the time for filing is extended by the Court for good cause shown.

12. All claims are subject to review and rejection by the Master.

13. All claims may be reviewed by any claimant during normal business hours at the office of the Master.

14. The decision of the Master to approve or reject a claim may be appealed to this Court after notice to John Sturc and Michael Mann at the SEC, Herbert E. Milstein and Jon B. Sigerman, and any other claimant or counsel who has filed an appearance.

15. As a precondition to filing any claim, a claimant shall execute a release which states in substance that the claimant releases and waives any claims against the defendants which relate to or arise out of the purchase or sale of Santa Fe common stock or call options for the common stock of Santa Fe. As part of this release, the claimant shall agree that the claims procedure is the claimant's sole and exclusive remedy with respect to any damage claimed to have been suffered by the claimant as a result of the defendants' purchase or sale of Santa Fe common stock and/or call options for the common stock of Santa Fe.

16. Any claim asserted by a claimant shall be in writing and shall provide adequate documentary evidence, where available, to support each claim. The Master may require any claimant to submit additional information which the Master deems necessary or appropriate. Failure to comply with the

Master's requests may result in denial of the claim with prejudice, or disqualification from participation in the claim procedure, or both.

17. At least 20 days prior to distributing all or part of the Claims Fund, the Master shall notify all then known claimants and this Court in writing of his intention to make such a distribution. Any objections to such distribution must be filed in writing five days before the date for such distribution, with notice to all claimants. The Master shall consider the objection(s) and notify the claimants in writing of his decision. The aggrieved claimant(s) shall have 21 days from the date the decision is sent to the claimant to file a written appeal to this Court. Notwithstanding the lack of any objection, the Court shall hold a hearing to determine the manner in which the Claims Funds shall be distributed or paid by the Master.

PROOF OF CLAIM AND RELEASE

18. To participate in the distribution of the Claims Fund, you are required to file on or before July 28, 1986, a Proof of Claim and Release, signed under oath, in the form annexed to this Notice, supported by such documents as are called for in the Proof of Claim and Release.

19. Execution and filing of the Proof of Claim and Release constitutes a complete and final release by the claimant of any and all claims against the defendants which relate to or arise out of the purchase or sale of Santa Fe common stock or call options.

20. Any person who fails to file a Proof of Claim and Release within the time provided, will be precluded from receiving any payment from the Claims Fund, unless the time for filing is extended by the Court for good cause shown.

NOTICE OF HEARING ON ANY OBJECTIONS TO CLAIMS PROCEDURE

21. Pursuant to the Court's Order dated Feb. 26, 1986, notice is hereby given that a hearing will be held on June 13, 1986, at 2:00 p.m. in Courtroom 618, at the United States Courthouse, Foley Square, New York, New York, for the purpose of considering any objections of any claimant to the claims procedure set forth in this Notice.

22. Any claimant may appear at the Hearing either in person or by counsel, and oppose the claims procedure. However, no person shall be heard unless his objection is made in writing and filed with the Court, together with all supporting papers and briefs, no later than May 30, 1986, with proof of service of such papers on all those persons identified in paragraph 10 above.

BROKERS AND FINANCIAL INSTITUTIONS

23. Brokers and others who, as record but not beneficial owners, sold Santa Fe common stock during the period September 21, 1981 through September 23, 1981, inclusive, have been requested by the Court to forward this Notice and the annexed Proof of Claim and Release to the persons who were the beneficial owners of the Santa Fe common stock described above.

PLEASE DO NOT CALL OR WRITE TO THE COURT OR THE CLERK.

Dated: New York, New York
Feb. 26, 1986

BY ORDER OF THE COURT
The Honorable William C. Conner

ORDER ESTABLISHING A CLAIMS FUND AND CLAIMS PROCEDURE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 6553 (WCC)

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff

v.

CERTAIN UNKNOWN PURCHASERS OF THE COMMON STOCK OF, AND CALL OPTIONS FOR THE COMMON STOCK OF, SANTA FE INTERNATIONAL CORPORATION, *et al.*
Defendants.

PROOF OF CLAIM AND RELEASE

IMPORTANT INSTRUCTIONS

THIS PROOF OF CLAIM AND RELEASE MUST BE TIMELY SUBMITTED BY JULY 28, 1986 IN ORDER FOR YOU TO PARTICIPATE IN THE CLAIMS FUND DESCRIBED IN THE ACCOMPANYING NOTICE

1. You must be a person or entity who sold common stock of Santa Fe International Corporation from September 21, 1981 through September 23, 1981, and had net stock sales of Santa Fe common stock during this period, as defined in the accompanying Notice.

2. YOU MUST FULLY COMPLETE AND SIGN AND SWEAR TO OR AFFIRM THIS PROOF OF CLAIM AND RELEASE BEFORE A NOTARY PUBLIC.

3. You must attach to your proof of claim originals or copies of brokers' confirmations, or monthly statements, or tax returns, or daily position or trading summaries, or other documents showing your sales and purchases of Santa Fe common stock during the relevant period as described in the accompanying Notice.

4. YOUR PROOF OF CLAIM MUST BE FILED NO LATER THAN JULY 28, 1986 WITH THE MASTER, IRWIN B. SCHUMER OF BUCHBINDER, STEIN, TUNICK & PLATKIN, ADDRESSED TO:

Irwin B. Schumer, C.P.A.
Buchbinder, Stein, Tunick & Platkin
One Pennsylvania Plaza
New York, New York 10119

Re: Santa Fe Securities Litigation

A proof of claim shall be deemed filed (i) when posted, if it is mailed to the Master at the above address by first class, registered or certified mail, postage pre-paid, or (ii) if otherwise sent, when it is actually recieved by the Master.

5. If you have any questions concerning the Notice or this Proof of Claim and Release, you may write to the Master, at the address provided in paragraph 4 above.

NOTICE TO BROKERS AND OTHER NON-BENEFICIAL OWNERS

The Court has requested that all brokerage concerns and other persons who, of record but not beneficially, sold Santa Fe common stock during the period September 21, 1981 through September 23, 1981, inclusive, forward a copy of this Proof of Claim and Release to the persons who were the beneficial owners of the Santa Fe common stock described above. Additional copies of the Notice, and of the Proof of Claim and Release, can be obtained from the Master, addressed as follows:

Irwin B. Schumer, C.P.A.
Buchbinder, Stein, Tunick & Platkin
One Pennsylvania Plaza
New York, New York 10119

Re: Santa Fe Securities Litigation

STATEMENT OF CLAIM

II. PURCHASES/SALES OF SANTA FE COMMON STOCK

During the period from September 21, 1981 through September 23, 1981 I made the following purchases/sales of Santa Fe common stock:

Purchase (P) or Sale (S)	Trade Date	No. of Shares Purchased/ Sold	Price of Stock Purchased/ Sold	Gross Purchase/ Sales Price
_____	_____	_____	$_____	$_____
_____	_____	_____	$_____	$_____
_____	_____	_____	$_____	$_____
_____	_____	_____	$_____	$_____
_____	_____	_____	$_____	$_____
_____	_____	_____	$_____	$_____
_____	_____	_____	$_____	$_____
_____	_____	_____	$_____	$_____
_____	_____	_____	$_____	$_____
_____	_____	_____	$_____	$_____

YOU MUST ATTACH COPIES OF BROKERAGE CONFIRMATIONS, MONTHLY STATEMENTS, TAX RETURNS, DAILY POSITION OR TRADING SUMMARIES, OR OTHER DOCUMENTS THAT SUPPORT YOUR CLAIM.

PLEASE TYPE OR PRINT THE FOLLOWING INFORMATION:

1. Claimant's Name: _____

2. Claimant's Address: _____
Street

_____
City State Zip Code

3. Claimant's Tel. No: _____
(Area Code)

4. Claimant's Capacity
(Owner, Agent, Executor
Successor): _____

RELEASE

I UNDERSTAND THAT BY FILING THIS PROOF OF CLAIM I HEREBY RELEASE THE DEFENDANTS IN THIS ACTION, OF AND FROM ANY AND ALL DEBTS, DEMANDS, ACTIONS, CAUSES OF ACTION, SUITS, ACCOUNTS, COVENTS, FIDUCIARY DUTIES, CONTRACTS, CONTROVERSIES, AGREEMENTS, PROMISES, OMISSIONS, NEGLIGENCE, INTENTIONAL WRONGDOING, VIOLATIONS, DAMAGES AND LIABILITIES OF WHATEVER KIND OR NATURE, IN LAW OR EQUITY OR OTHERWISE, WHETHER NOW KNOWN OR UNKNOWN, SUSPECTED OR UNSUSPECTED, CLAIMED OR UNCLAIMED, AND WHETHER OR NOT CONCEALED OR HIDDEN, WHICH I NOW HAVE, MAY HAVE OR COULD HAVE OR WHICH I NOW OWN OR HOLD OR AT ANY TIME HERETOFORE OWNED OR HELD AS AGAINST AN ANY PERSON OR ENTITY BEING RELEASED HEREIN, INCLUDING, WITHOUT LIMITATION, ANY AND ALL CLAIMS, DEMANDS, OBLIGATIONS, CAUSES OF ACTION OR LIABILITIES WHICH IN ANY WAY RELATE

TO OR ARISE OUT OF EITHER THE PURCHASE OR SALE OF SECURITIES OF SANTA FE INTERNATIONAL CORPORATION.

AS A PART OF THE CONSIDERATION HEREIN, IT IS MY INTENTION IN EXECUTING THIS GENERAL RELEASE THAT THE SAME SHALL CONSTITUTE A FULL AND EFFECTIVE RELEASE IN ACCORDANCE WITH ITS TERMS; AND IN FURTHERANCE OF THIS INTENTION, I HEREBY EXPRESSLY WAIVE ANY AND ALL RIGHTS CONFERRED UPON ME, IF ANY, BY THE PROVISIONS OF STATUTES, SUCH AS SECTION 1542 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA, WHICH PROVIDES:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

I SWEAR THAT THE FOREGOING STATEMENTS ARE TRUE, CORRECT AND COMPLETE, UNDER THE PENALTIES OF PERJURY.

_____

Claimant's Signature

Sworn to before me this ____

day of _____ 1986.

_____

Notary Public

(Seal or Stamp)

ORDER ESTABLISHING A CLAIMS FUND AND CLAIMS PROCEDURE

EXHIBIT III

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 6553 (WCC)

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

CERTAIN UNKNOWN PURCHASERS OF THE COMMON STOCK OF, AND CALL OPTIONS FOR THE COMMON STOCK OF, SANTA FE INTERNATIONAL CORPORATION, *et al.*
Defendants.

SUMMARY NOTICE OF DISGORGEMENT AND CLAIMS PROCEDURE

TO: ALL PERSONS WHO SOLD CALL OPTIONS FOR THE COMMON STOCK OF SANTA FE INTERNATIONAL CORPORATION FROM SEPTEMBER 22, 1981 THROUGH OCTOBER 1, 1981

This Summary Notice is to inform you that a settlement has been reached in the above-captioned action whereby defendants have agreed to disgorge profits they made from the purchase of call options for the purchase of Santa Fe

International Corporation common stock in the Fall of 1981. Under the direction of the Court, a Master, Irwin B. Schumer of Buchbinder, Stein, Tunick & Platkin, One Pennsylvania Plaza, New York, New York 10119, has been appointed to process claims to these funds.

If you sold call options for the common stock of Santa Fe International Corporation from September 22, 1981 through October 1, 1981, and have not yet received the detailed Notice and Proof of Claim which has been mailed to the last known address of such sellers and purchasers, you may obtain such copies by writing Irwin B. Schumer, C.P.A., Buchbinder, Stein, Tunick & Platkin, One Pennsylvania Plaza, New York, New York 10119 or by telephoning Mr. Schumer at (212) 695-5003.

Dated:

Clerk of the Court
United States District Court
Southern District of New York

ORDER ESTABLISHING A CLAIMS FUND AND CLAIMS PROCEDURE

EXHIBIT IV

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 6553 (WCC)

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

CERTAIN UNKNOWN PURCHASERS OF THE COMMON STOCK OF, AND CALL OPTIONS FOR THE COMMON STOCK OF, SANTA FE INTERNATIONAL CORPORATION, *et al.*
Defendants.

SUMMARY NOTICE OF DISGORGEMENT AND CLAIMS PROCEDURE

TO: ALL PERSONS WHO SOLD COMMON STOCK OF SANTA FE INTERNATIONAL CORPORATION FROM SEPTEMBER 21, 1981 THROUGH SEPTEMBER 23, 1981

This Summary Notice is to inform you that a settlement has been reached in the above-captioned action whereby defendants have agreed to disgorge profits they made from the purchase of common stock of Santa Fe International Corporation on September 22, 1981. Under the direction

of the Court, a Master, Irwin B. Schumer of Buchbinder, Stein, Tunnick & Platkin, One Pennsylvania Plaza, New York, New York 10119, has been appointed to process claims to these funds.

If you sold common stock of Santa Fe International corporation from September 21, 1981 through September 23, 1981, and have not yet received the detailed Notice and Proof of Claim which has been mailed to the last known address of such sellers, you may obtain such copies by writing Irwin B. Schumer, C.P.A., Buchbinder, Stein, Tunick & Platkin, One Pennsylvania Plaza, New York, New York 10119 or by telephoning Mr. Schumer at (212) 695-5003.

Dated:

Clerk of Court
United States District Court
Southern District of New York

APPENDIX E

APPENDIX E

OBJECTOR OLAGUES' OBJECTIONS TO ORDER ESTABLISHING A CLAIMS FUND AND CLAIMS PROCEDURE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 6553 (WCC)

SECURITIES AND EXCHANGE COMMISSION,
PLAINTIFF

VERSUS

CERTAIN UNKNOWN PURCHASERS
OF COMMON STOCK OF,
AND CALL OPTIONS FOR THE COMMON STOCK
OF SANTA FE INTERNATIONAL CORPORATION,
DEFENDANTS

JUN 10 1986
(stamp)

OBJECTION TO ORDER ESTABLISHING A CLAIMS FUND AND CLAIMS PROCEDURE

Now into Court, through undersigned counsel, comes John Olagues, and on suggesting to the court that he opposes and objects to the proposed claims procedures in the Order

Establishing a Claims Fund and Claims Procedure of Case # 81 Civ. 6553 (WCC) filed February 26, 1986 to the extent that:

I.

The proposed procedures exclude anyone who opened short call positions before September 22, 1981 from a portion of the disgorgements.

II.

The proposed procedures define "litigating option traders" as those who have filed private civil actions against the defendants and others in the United States District Court for the Northern District of California, Civil Action Number C-84-6320 (WHO) and in the United States District Court for the Southern District of New York, Civil Action Number 84 Civ. 6811 (RIC), thereby creating a privileged class and denying those who will be filing private civil actions in the future, and nonlitigating market makers, the public and other traders from participating in a portion of the disgorgements.

III.

The proposed procedures allow "direct" sellers to enjoy a privileged position over all others.

IV.

The proposed procedures require the claimants to file their claims and to simultaneously execute a release without knowing at the time their claim is filed and the release is executed, how many other claimants are participating in the

fund and what portion of the fund they are to receive in satisfaction of their claim.

Respectfully Submitted,

s/s George B. Recile
GEORGE B. RECILE
710 Carondelet Street
New Orleans, LA 70130
(504) 588-9014

APPENDIX F

APPENDIX F

FINAL JUDGMENT DENYING OBJECTION OF CERTAIN PERSONS AND RULE 54(b) CERTIFICATE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 6553 (WCC)

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

(versus)

CERTAIN UNKNOWN PURCHASERS OF THE COMMON STOCK OF, AND CALL OPTIONS FOR THE COMMON STOCK OF, SANTA FE INTERNATIONAL CORPORATION, FAISAL AL MASSOUD AL FUHAID LUAY TEWFIK AL SWAIDI,
Defendants.

FILED
JUL 14 1986
(stamp)

JUL 1 1986
(stamp)

The Court having considered the Order Establishing a Claims Fund and Claims Procedure, dated February 26, 1986 ("Order"), the objections filed on behalf of Harris D. Leinwand, John Olagues and Alan E. Zimmer, Jr. (the "objectors"), the briefs filed by the plaintiff Securities and Exchange Commission and on behalf of the French and Charles plaintiffs, and the oral arguments presented at the hearing held on June 13, 1986,

IT IS HEREBY ORDERED AND ADJUDGED that the objections filed by the objectors to the Order Establishing a Claims Fund and Claims Procedure, dated February 26, 1986, be and the same hereby are denied with prejudice and that the Claims Fund be distributed as provided in the Order dated February 26, 1986.

IT IS FURTHER ORDERED AND ADJUDGED that the within Judgment is stayed for ten (10) days in accordance with the provisions of Rule 62(a) of the Federal Rules of Civil Procedure.

The Court hereby certifies, in accordance with Rule 54(b) Fed.R.Civ.P.:

(i) That the Court has determined that there is no just reason for delay; and

(2) That the Court has directed the entry of final judgment denying with prejudice the objections filed on behalf of Harris D. Leinwand, John Olagues and Alan E. Zimmer, Jr., and directing that the Claims Fund be distributed as provided in the Order dated February 26, 1986.

s/s William C. Conner
U.S.D.J.

Dated: July 11, 1986

APPENDIX G

APPENDIX G

OBJECTOR OLAGUES REQUEST FOR ORAL HEARING ON MOTION FOR INTERVENTION

JOHN OLAGUES
47 Ridge Ave.
Mill Valley, CA 94942
(415) 381-5624

Pro Se

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 6553 (WCC)

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff

vs.

CERTAIN UNKNOWN PURCHASERS
OF COMMON STOCK OF,
AND CALL OPTIONS FOR THE COMMON STOCK OF
SANTA FE INTERNATIONAL CORPORATION,
Defendants.

U.S. DISTRICT COURT
JUL 21 1986
(stamp)

MEMO ENDORSED
(stamp)

U.S. DISTRICT COURT
FILED
JUL 29 1986
S. D. OF N. Y.
(stamp)

REQUEST FOR ORAL HEARING ON MOTION FOR INTERVENTION

Proposed intervenor, John Olagues, Pro Se does request an oral hearing to discuss subtle and complex issues of this motion for intervention.

Respectfully submitted,

s/s John Olagues
John Olagues

Request DENIED
so ordered 7/25/86.

William C. Conner
U S D J

NO. _____

Supreme Court, U.S.
FILED
JAN 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

John Olagues,

Petitioner,

versus

Securities and Exchange Commission,

Respondent,

Richard James French, d/b/a Neild Cruikshank & Company-Pacific; Jose Pascual; Harry C. Polonitza and Company; Steven S. Mitchell and Alan Schmidt,

Respondent,

versus

David Chan; Opex Investments Inc.; Rudolf M. Binnewies; William A. Charles; Sold Inc., Montgomery and Mader, N.A., Montgomery; Richard E. Mader and Craig A. Resnick,

Respondent,

versus

Certain Unknown Purchasers of the Common Stock of and Call Options for the Common Stock of Santa Fe International Corporation; Credit Suisse; Swiss American Securities, Inc., Citibank, N.A.; Lombard Odier & Cri.; Morgan Guaranty Trust Company of New York; Swiss Bank Corporation; Drexel Burnham Lambert, Inc.; The Chase Manhattan Bank, N.A.; Moseley, Hallgarten, Estabrook & Weeden, Inc.; Faisal Al Massoud Al Fuhaid,

Respondent.

BRIEF OF THE FRENCH RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

No. _____

John Olagues,

Petitioner,

versus

Securities and Exchange Commission,

Respondent,

Richard James French, d/b/a Neild Cruikshank & Company-Pacific; Jose Pascual; Harry C. Polonitza and Company; Steven S. Mitchell and Alan Schmidt,

Respondent,

versus

David Chan; Opex Investments Inc.; Rudolf M. Binnewies; William A. Charles; Sold Inc., Montgomery and Mader, N.A., Montgomery; Richard E. Mader and Craig A. Resnick,

Respondent,

versus

Certain Unknown Purchasers of the Common Stock of and Call Options for the Common Stock of Santa Fe International Corporation; Credit Suisse; Swiss American Securities, Inc., Citibank, N.A.; Lombard Odier & Cri.; Morgan Guaranty Trust Company of New York; Swiss Bank Corporation; Drexel Burnham Lambert, Inc.; The Chase Manhattan Bank, N.A.; Moseley, Hallgarten, Estabrook & Weeden, Inc.; Faisal Al Massoud Al Fuhaid,

Respondent.

BRIEF OF THE FRENCH RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

I. STATEMENT

On October 26, 1981 the Securities and Exchange Commission ("SEC" or the "Commission") filed an enforcement action alleging that from September 21 through October 1, 1981, the defendant "unknown purchasers" and Faisal al Massoud al Fuhaid violated

§ 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b) and Rule 10b-5 by purchasing call options and shares of the common stock of Santa Fe Int'l Corporation based on insider information. The Commission sought injunctions against future violations as well as disgorgement of illegal profits received as a result of defendants' unlawful trading. On October 26, 1981, the district court entered a temporary restraining order freezing all profits which could be subject to the SEC's sought disgorgement.

During the pendency of the SEC's enforcement action two groups of private investors the French and Charles respondents,[1] brought civil suits against defendants to recover damages based on the same illegal trading in Santa Fe securities. The French respondents commenced two actions in the Southern District of New York and the Charles respondents instituted their action in the United States District Court for the Northern District of California.

In early February, 1986, the SEC entered into Consents and Undertakings with each of the defendants and the private litigants entered into a settlement agreement with the defendants.

---

[1] The French and Charles respondents refer to two groups of options traders who commenced private actions against the defendants in the SEC enforcement action. French, et al. v. Keaton, et al., 84 Civ. 6811 (RLC) (S.D.N.Y.); French, et al. v. al Fuhaid, et al., 83 Civ. 1745 (RLC) (S.D.N.Y.) and Charles, et al v. Keaton, et al., Civil Action No. C-84-6320 (WHO) (N.D. Cal.). The French and Charles respondents did not merely allege violations of the federal securities laws but also alleged violations of RICO, 18 U.S.C. § 1961, et seq., and common law causes of action, including fraud.

On February 26, 1986 the district court entered a "Order Establishing a Claims Fund and Claims Fund Procedure ("Order")." The Order set forth the terms of the settlement of the SEC enforcement action. Entry of the Order was also a condition precedent to settlement of the private lawsuits brought against the defendants.

Pursuant to the Order, within one day of its entry, $2.85 million of the monies which had been frozen by the Court were to be paid at the direction of defendants to the private litigating option traders, the Charles and French respondents.[2] In connection with the SEC settlement, the Order further provided for the creation of two separate funds; one to hold the defendants'

---

[2] Olagues' allegations that there was something improper about the settlement obtained by the Charles and French respondents is totally unfounded. As stated by the Court of Appeals: "[n]othing prevented ... Olagues from bringing [his] own action against defendants, just as the French and Charles plaintiffs did." SEC v. Cert. Unknown Purchasers of Commn Stock, 817 F.2d 1018, 1022 (2nd Cir. 1987). Indeed, as stated by the defendants in their Brief in Opposition to Olagues' Appeal to the Second Circuit:

> Fourth, the payment [to the Charles and French Respondents] was in part a recognition that, but for the private options traders (a) filing and pursuing their actions against the purchasers, (b) providing proof of their trades and actual losses, and (c) assisting in negotiating the settlement and drafting the settlement documents, the purchasers may never have agreed to settle the SEC action.

Defs. Br. at 9. As the Court of Appeals concluded, "[Olagues] should not expect to be able to stand aside and watch others incur the expenses of lengthy litigation and then expect the results of these efforts." SEC v. Cert. Unknown Purchasers of Common Stock, 817 F.2d at 1022.

disgorged profits derived from transactions in common stock from September 21, 1981 through September 23, 1981 (Claims Fund B, $492,317) and the other to hold disgorged profits from transactions and options during the period September 22 through October 1, 1981 (the "window period") (Claims Fund A, $4,499,527). Claims Fund A was further divided into two sub-funds. Sub-fund I represented claims of those who sustained losses in direct options trade with defendants during the window period. Sub-fund II represented the claims of those who did not deal directly but traded contemporaneously with the defendants and sustained losses as a result of options dealing during the window period. Only claimants who suffered actual out-of-pocket losses as a result of defendants' illegal trading were permitted, pursuant to the SEC settlement, to receive their pro rata share of the settlement proceeds.

On June 13, 1986, the district court held a hearing "to consider any objections of any claimant to the claims procedure proposed by [the plan of settlement]." Joint Appendix at 127-28. Only three objectors, including petitioner Olagues, appeared at that hearing and urged Judge Connor to reject the Plan of Distribution. Olagues argued that the Plan's definition of the window period for which claims could be filed unfairly excluded him from participation in the settlement. In particular, Olagues claimed he was harmed by defendants' non-disclosure of inside information because he held option contracts that remained "open" during the window period when insider trading adversely affected

the market. Judge Connor rejected Olagues' claim and denied his motion to intervene as a party under Fed. R. Civ. P. 24(a).

Olagues appealed the district court's decision which the Court of Appeals for the Second Circuit denied, affirming the lower court's denial of Olagues' motion to intervene and dismissing his appeal for lack of standing. The Court of Appeals held that generally only a party to an action has standing to appeal. Moreover, the Court found that Olagues could show no interest relating to the property or transaction which was the subject of the action since disgorgement of profits under the settlement agreement was based solely on the defendants potential Rule 10b-5 liability for insider trading during the window period. Insofar as Olagues had completed his transactions prior to that period he could not claim to have any significantly protectable interest in the litigation that would be impaired by the disposition of the case. The Court of Appeals found that the district court did not err in denying Olagues' motion to intervene because Olagues was not a party to the action and he lacked standing to challenge the settlement Order on appeal.

II. The District Court and Court of Appeals Correctly Disposed of Petitioner's Claims.

Olagues files this Petition for a Writ of Certiorari based on a claimed deprivation of procedural due process. Olagues argues that if he had been given notice to participate in the hearing on the Order approving the Plan of Distribution in which

he alleges the trading window period was established, he would have had standing, and that the failure of the parties to accord him notice of this hearing accordingly constituted a deprivation of due process. Olagues' argument is erroneously predicated upon the belief that the Order providing for the Plan of Distribution as opposed to the SEC's Amended Complaint established the "trading window period". In any event, as held by the Court of Appeals for the Second Circuit in affirming the District Court's decision, Olagues has no claim to the settlement fund and no significantly protectable interest in the litigation that was impaired by the disposition of this case or the failure to give Olagues notice.

Although, Olagues now frames his appeal to this Court in terms of a failure to be granted notice, his real claim is the same as that raised before the District Court and Court of Appeals. Basically, Olagues argues that the claims period should have been broadened to include trades he conducted in August 1981, one and a half months before the defendants' transactions even took place. As the District Court and the Court of Appeals correctly noted in response to Olagues' objection, the proceeds of the disgorgement flow only from defendants trading during the period September 22 through October 1, since it was only during this period that the SEC's amended complaint alleged that the options market was distorted by defendants' alleged insider trading.

Olagues argues that the SEC possessed information showing that defendant Nassir's illegal activity may have commenced as early as August 11, 1981 and that profits disgorged accordingly should have covered all those injured as a result of that activity. The question of the propriety of the SEC's decision not to seek to further amend its complaint to broaden the period of the alleged violation is not now nor would it have been at issue at the time of the hearing in connection with entry of the Order of the Plan of Distribution by the Court. Indeed while courts enjoy broad discretion in creating restitutionary remedies, they have generally held that in the context of government enforcement Consent decrees, "[u]nless a consent decree is unfair, inadequate or unreasonable, it ought to be approved." SEC v. Randolph, 736 F.2d 525, 529 (9th Cir. 1984). In Randolph, a related Santa Fe insider trading enforcement case, the Court of Appeals for the Ninth Circuit reversed the district court's disapproval of a Consent Decree because defendants were not required to pay prejudgment interest on disgorged profits. In so doing the court explained:

> The court should ... defer [ ] to the agencies' decision that the decree is appropriate and simply insured [ ] that the proposed judgment is reasonable.

Id. Accordingly, district courts should pay deference to the judgment of the government agency which in its prosecutorial discretion decided to bring an action for a stated period of violation and which negotiates and submits the proposed judgment

based on that complaint. Id. at 529. Accord, Marshall v. Holiday Magic, Inc., 550 F.2d 1173 (9th Cir. 1977); U.S. v. City of Miami, 614 F.2d 1322, 1332, n.18 (5th Cir. 1980), aff'd as modified, 664 F.2d 435 (5th Cir. 1981) (en banc) (presence of Justice Dept. in suit allowed court "safely [to] assume that the interest of all effected had been considered ..."; In re Mid-Atlantic Toyota Antitrust Litigation, 564 F. Supp. 1379 (D. Md. 1983).[3]

Olagues cannot claim to be harmed by the Commission's decision not to broaden the allegations brought or the settlement obtained, since Olagues has a private right of action to sue for damages on whatever basis he might choose. Indeed, the Court of Appeals for the Second Circuit has held that injured investors may not intervene as of right in SEC enforcement proceedings

---

[3] Olagues' extensive citation of class action authority in support of his claimed deprivation of due process is inapposite. Olagues leaves the erroneous impression that the standards to be applied by the district court in reviewing the SEC's settlement should have been or were the same as those involving review of settlements in class action cases. This is not the case. Moreover, that a due process interest has been found to arise in the context of such class cases requiring notice of pendency and settlement is predicated on the binding nature of such judicial dispositions on individual members within the class. 2 Newberg on Class Actions, Section 8.04 (2d ed. 1986). Neither the private settlement nor the SEC disgorgement claims procedure finds those who either cannot or chose not to take advantage of the SEC disgorgement fund. All such individuals who may have been injured by the defendants' unlawful activities have their own private rights of action against the defendants. Moreover, neither the SEC nor the private French litigants have been or sought to be approved to or otherwise represent any class of injured investors. The SEC represents the public at large; the private litigants represented their own interests in securing damages sustained by them alone.

precisely because of their private rights of action under the securities laws. As a result of such rights of action, individual injured investors cannot be said, for purposes of Fed. R. Civ. P. 24 to be so "so situated that the disposition of the [SEC enforcement] action will, as a practical matter, impair or impede their ability to protect their interest" as to the same violation. SEC v. Everest Management Corp., 475 F.2d 1236, 1239 (2d Cir. 1972). See also, SEC v. Canadian Javelin, Ltd., 64 F.R.D. 648, 650-51 (S.D.N.Y. 1974), appeal dismissed, 538 F.2d 313 (2d Cir. 1976); SEC v. Vesco, 58 F.R.D. 182 (S.D.N.Y. 1973). Quite simply, third party injured investors have no vested interest in the remedy in an SEC disgorgement action since the disposition of such an action does not impair their private right to damages.

Moreover, the disgorgement remedy under the securities laws is a government enforcement mechanism the central purpose of which is to determine the amount by which a wrongdoer has been unjustly enriched and to make him disgorge that amount. SEC v. Commonwealth Chemicals Securities, Inc., 574 F.2d 90, 102 (2d Cir. 1978); SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978); SEC v. Penn Central Co., 425 F. Supp. 593, 599 (E.D. Pa. 1976). The disgorgement remedy was not designed to provide redress victims who have suffered injury. If compensation results, it is only a by-product of the agency's efforts to re-establish compliance with its regulatory scheme. As stated by the Court of Appeals for the Sixth Circuit:

> Once the Commission has established that defendant has violated the securities laws, the district court possesses the equitable power to grant disgorgement without requiring whether, or to what extent, identifiable private parties have been damaged by [the defendant's] fraud.

SEC v. Blavin, 7660 F.2d 706, 713 (6th Cir. 1985). As otherwise stated by the court in SEC v. Andes, No. 82-1659, slip op. at p. 4 (E.D. Pa. Jan. 23, 1986) "it is significant to note that the primary purpose of disgorgement is not to compensate investors .... [T]his court does not view Mr. Hogan as having an 'entitlement' to share in the distribution here."

In sum, both the district court and the court of appeals have properly decided this case, the SEC reasonably entered into a settlement which based on the allegations of its complaint allowed claimants who, during an alleged period of violation, suffered out-of-pocket losses to receive a proportionate share of disgorged profits obtained in connection with an SEC enforcement matter. Mr. Olagues' transactions were completed before the commencement of the window period and he did not trade during the window period. The SEC properly exercised its prosecutorial discretion bringing the case in the manner in which it did and settling it in the manner which it did. Mr. Olagues has no interest which would have allowed him to intervene in the SEC proceeding since he cannot demonstrate any interest relating to the property or transaction which is the subject of the action. Because he was not induced by defendants acting on inside information to purchase or sell securities during the window

period he has no claim under Rule 10b-5 to the settlement fund and no significantly protectable interest in the litigation that could have been impaired. Indeed, he has no protectable interest in disgorgement funds whatsoever, since the disposition of any such funds whether they related to the same period or not did not impair Mr. Olagues' private right of action for damages. Both the District Court and the Court of Appeals were correct in their determination that Mr. Olagues lacked standing to challenge the settlement or to intervene in the litigation.

III. The Petition Fails to State a Reason for Granting Certiorari.

Rule 17 of this Court provides:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:
>
> > a. When a federal court of appeals has rendered a decision in conflict with a decision of another federal court of appeals on the same manner; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted unusual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision ....
> >
> > c. When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this

Court or has decided a federal question in a way in conflict with applicable decisions of this Court.

Olagues has shown no conflicts among the circuits, no conflict with the decisions of this Court, no important question of federal law that this Court has not previously decided, and certainly no unusual departure from the normal course of judicial proceedings.

IV. CONCLUSION

No basis for review by this court exists, the court below properly decided the matters raised before them, and no writ of certiorari should issue.

Respectfully submitted,

Dated: January 11, 1988

Herbert E. Milstein
Steven J. Toll
Patricia F. Bak
COHEN, MILSTEIN & HAUSFELD
1401 New York Ave., N.W.
Suite 600
Washington, D.C. 20005
(202) 628-3500

COUNSEL FOR THE FRENCH RESPONDENTS

AFFIDAVIT OF SERVICE

STATE OF District of Columbia)
COUNTY OF Washington) to wit:

I hereby swear that I am a member of the Bar of the Supreme Court of the United States and that on January 11, 1988, to my knowledge the attached Brief of the French Respondents in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit was depoisited in a United States mail box, with first class postage prepaid, properly addressed to the Clerk of the United States Supreme Court. That on the same date I caused to be served by depositing in a United States mail box, first class postage prepaid, a copy of the same brief to the following:

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NOTARY PUBLIC

My Commission Expires May 14, 1988

No. 87-769

Supreme Court, U.S.
FILED
JAN 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN OLAGUES,

Petitioner.

versus

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

RICHARD JAMES FRENCH, d/b/a NEILD CRUIKSHANK & COMPANY—PACIFIC; JOSE PASCUAL; HARRY C. POLONITZA AND COMPANY; STEVEN S. MITCHELL and ALAN SCHMIDT,

Respondent.

versus

DAVID CHAN; OPEX INVESTMENTS INC.; RUDOLF M. BINNEWIES; WILLIAM A. CHARLES; SOLD INC., MONTGOMERY AND MADER, N.A., MONTGOMERY; RICHARD E. MADER and CRAIG A. RESNICK,

Respondent.

versus

Certain Unknown Purchasers of the Common Stock of and Call Options for the Common Stock of Santa Fe International Corporation; CREDIT SUISSE; SWISS AMERICAN SECURITIES, INC., CITIBANK, N.A.; LOMBARD ODIER & CRI.; MORGAN GUARANTY TRUST COMPANY OF NEW YORK; SWISS BANK CORPORATION; DREXEL BURNHAM LAMBERT, INC.; THE CHASE MANHATTAN BANK, N.A.; MOSELEY, HALLGARTEN, ESTABROOK & WEEDEN, INC.; FAISAL AL MASSOUD AL FUHAID,

Respondent.

BRIEF OF THE FRENCH RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent.

BRIEF OF THE FRENCH RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

I. Statement

On October 26, 1981 the Securities and Exchange Commission ("SEC" or the "Commission") filed an enforcement action alleging that from September 21 through October 1, 1981, the defendant "unknown purchasers" and Faisal al Massoud al Fuhaid violated § 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b) and Rule 10b-5 by purchasing call options and shares of the common stock of Santa Fe Int'l Corporation based on insider information. The Commission sought injunctions against future violations as well as disgorgement of illegal profits received as a result of defendants' unlawful trading. On October 26, 1981, the district court entered a temporary restraining order freezing all profits which could be subject to the SEC's sought disgorgement.

During the pendency of the SEC's enforcement action two groups of private investors the French and Charles respondents,[1] brought civil suits against

[1] The French and Charles respondents refer to two groups of options traders who commenced private actions against the defendants in the SEC enforcement action. *French, et al. v. Keaton, et al.*, 84 Civ. 6811 (RLC) (S.D.N.Y.); *French, et al. v. al Fuhaid, et al.*, 83 Civ. 1745 (RLC) (S.D.N.Y.) and *Charles, et al v. Keaton, et al.*, Civil Action No. C-84-6320 (WHO) (N.D.

defendants to recover damages based on the same illegal trading in Santa Fe securities. The French respondents commenced two actions in the Southern District of New York and the Charles respondents instituted their action in the United States District Court for the Northern District of California.

In early February, 1986, the SEC entered into Consents and Undertakings with each of the defendants and the private litigants entered into a settlement agreement with the defendants. On February 26, 1986 the district court entered an "Order Establishing a Claims Fund and Claims Fund Procedure ("Order")." The Order set forth the terms of the settlement of the SEC enforcement action. Entry of the Order was also a condition precedent to settlement of the private lawsuits brought against the defendants.

Pursuant to the Order, within one day of its entry, $2.85 million of the monies which had been frozen by the Court were to be paid at the direction of defendants to the private litigating option traders, the Charles and French respondents.[2] In connection with

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Cal.). The French and Charles respondents did not merely allege violations of the federal securities laws but also alleged violation of RICO, 18 U.S.C. § 1961, *et seq.*, and common law causes of action, including fraud.

[2] Olagues' allegations that there was something improper about the settlement obtained by the Charles and French respondents is totally unfounded. As stated by the Court of Appeals: "[n]othing prevented . . . Olagues from bringing [his] own action against defendants, just as the French and Charles plaintiffs did." *SEC v. Cert. Unknown Purchasers of Commn Stock*, 817 F.2d 1018, 1022 (2d Cir. 1987). Indeed, as stated by the defendants in their Brief in Opposition to Olagues' Appeal to

the SEC settlement, the Order further provided for the creation of two separate funds; one to hold the defendants' disgorged profits derived from transactions in common stock from September 21, 1981 through September 23, 1981 (Claims Fund B, $492,317) and the other to hold disgorged profits from transactions and options during the period September 22 through October 1, 1981 (the "window period") (Claims Fund A, $4,499,527). Claims Fund A was further divided into two sub-funds. Sub-fund I represented claims of those who sustained losses in direct options trade with defendants during the window period. Sub-fund II represented the claims of those who did not deal directly but traded contemporaneously with the defendants and sustained losses as a result of options dealing during the window period. Only claimants who suffered actual out-of-pocket losses as a result of defendants' illegal trading were permitted, pursuant to the SEC settlement, to receive their pro rata share of the settlement proceeds.

On June 13, 1986, the district court held a hearing "to consider any objections of any claimant to the

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the Second Circuit:

> Fourth, the payment [to the Charles and French Respondents] was in part a recognition that, but for the private options traders (a) filing and pursuing their actions against the purchasers, (b) providing proof of their trades and actual losses, and (c) assisting in negotiating the settlement and drafting the settlement documents, the purchasers may never have agreed to settle the SEC action.

Defs. Br. at 9. As the Court of Appeals concluded, "[Olagues] should not expect to be able to stand aside and watch others incur the expenses of lengthy litigation and then expect the results of these efforts." *SEC v. Cert. Unknown Purchasers of Common Stock*, 817 F.2d at 1022.

claims procedure proposed by [the plan of settlement]." Joint Appendix at 127-28. Only three objectors, including petitioner Olagues, appeared at that hearing and urged Judge Connor to reject the Plan of Distribution. Olagues argued that the Plan's definition of the window period for which claims could be filed unfairly excluded him from participation in the settlement. In particular, Olagues claimed he was harmed by defendants' non-disclosure of inside information because he held option contracts that remained "open" during the window period when insider trading adversely affected the market. Judge Connor rejected Olagues' claim and denied his motion to intervene as a party under Fed. R. Civ. P. 24(a).

Olagues appealed the district court's decision which the Court of Appeals for the Second Circuit denied, affirming the lower court's denial of Olagues' motion to intervene and dismissing his appeal for lack of standing. The Court of Appeals held that generally only a party to an action has standing to appeal. Moreover, the Court found that Olagues could show no interest relating to the property or transaction which was the subject of the action since disgorgement of profits under the settlement agreement was based solely on the defendants potential Rule 10b-5 liability for insider trading during the window period. Insofar as Olagues had completed his transactions prior to that period he could not claim to have any significantly protectable interest in the litigation that would be impaired by the disposition of the case. The Court of Appeals found that the district court did not err in denying Olagues' motion to intervene because Olagues was not a party to the action and he lacked standing to challenge the settlement Order on appeal.

II. The District Court and Court of Appeals Correctly Disposed of Petitioner's Claims.

Olagues files this Petition for a *Writ* of *Certiorari* based on a claimed deprivation of procedural due process. Olagues argues that if he had been given notice to participate in the hearing on the Order approving the Plan of Distribution in which he alleges the trading window period was established, he would have had standing, and that the failure of the parties to accord him notice of this hearing accordingly constituted a deprivation of due process. Olagues' argument is erroneously predicated upon the belief that the Order providing for the Plan of Distribution as opposed to the SEC's Amended Complaint established the "trading window period". In any event, as held by the Court of Appeals for the Second Circuit in affirming the District Court's decision, Olagues has no claim to the settlement fund and no significantly protectable interest in the litigation that was impaired by the disposition of this case or the failure to give Olagues notice.

Although, Olagues now frames his appeal to this Court in terms of a failure to be granted notice, his real claim is the same as that raised before the District Court and Court of Appeals. Basically, Olagues argues that the claims period should have been broadened to include trades he conducted in August 1981, one and a half months before the defendants' transactions even took place. As the District Court and the Court of Appeals correctly noted in response to Olagues' objection, the proceeds of the disgorgement flow only from defendants trading during the period September 22 through October 1, since it was only during this period that the SEC's amended complaint

alleged that the options market was distorted by defendants' alleged insider trading.

Olagues argues that the SEC possessed information showing that defendant Nassir's illegal activity may have commenced as early as August 11, 1981 and that profits disgorged accordingly should have covered all those injured as a result of that activity. The question of the propriety of the SEC's decision not to seek to further amend its complaint to broaden the period of the alleged violation is not now nor would it have been at issue at the time of the hearing in connection with entry of the Order of the Plan of Distribution by the Court. Indeed while courts enjoy broad discretion in creating restitutionary remedies, they have generally held that in the context of government enforcement Consent decrees, "[u]nless a consent decree is unfair, inadequate or unreasonable, it ought to be approved." *SEC v. Randolph,* 736 F.2d 525, 529 (9th Cir. 1984). In *Randolph,* a related Santa Fe insider trading enforcement case, the Court of Appeals for the Ninth Circuit reversed the district court's disapproval of a Consent Decree because defendants were not required to pay prejudgment interest on disgorged profits. In so doing the court explained:

> The court should . . . defer [ ] to the agencies' decision that the decree is appropriate and simply insured [ ] that the proposed judgment is reasonable.

Id. Accordingly, district courts should pay deference to the judgment of the government agency which in its prosecutorial discretion decided to bring an action for a stated period of violation and which negotiates

and submits the proposed judgment based on that complaint. *Id.* at 529. *Accord, Marshall v. Holiday Magic, Inc.,* 550 F.2d 1173 (9th Cir. 1977); *U.S. v. City of Miami,* 614 F.2d 1322, 1332, n.18 (5th Cir. 1980), *aff'd as modified,* 664 F.2d 435 (5th Cir. 1981) (*en banc*) (presence of Justice Dept. in suit allowed court "safely [to] assume that the interest of all effected had been considered . . ."; *In re Mid-Atlantic Toyota Antitrust Litigation,* 564 F. Supp. 1379 (D. Md. 1983).[3]

Olagues cannot claim to be harmed by the Commission's decision not to broaden the allegations brought or the settlement obtained, since Olagues has a private right of action to sue for damages on whatever basis he might choose. Indeed, the Court of

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[3] Olagues' extensive citation of class action authority in support of his claimed deprivation of due process is inapposite. Olagues leaves the erroneous impression that the standards to be applied by the district court in reviewing the SEC's settlement should have been or were the same as those involving review of settlements in class action cases. This is not the case. Moreover, that a due process interest has been found to arise in the context of such class cases requiring notice of pendency and settlement is predicated on the binding nature of such judicial dispositions on individual members within the class. 2 *Newberg on Class Actions,* Section 8.04 (2d ed. 1986). Neither the private settlement nor the SEC disgorgement claims procedure finds those who either cannot or chose not to take advantage of the SEC disgorgement fund. All such individuals who may have been injured by the defendants' unlawful activities have their own private rights of action against the defendants. Moreover, neither the SEC nor the private French litigants have been or sought to be approved to or otherwise represent any class of injured investors. The SEC represents the public at large; the private litigants represented their own interests in securing damages sustained by them alone.

Appeals for the Second Circuit has held that injured investors may not intervene as of right in SEC enforcement proceedings precisely because of their private rights of action under the securities laws. As a result of such rights of action, individual injured investors cannot be said, for purposes of Fed. R. Civ. P. 24 to be so "so situated that the disposition of the [SEC enforcement] action will, as a practical matter, impair or impede their ability to protect their interest" as to the same violation. *SEC v. Everest Management Corp.*, 475 F.2d 1236, 1239 (2nd Cir. 1972). *See also, SEC v. Canadian Javelin, Ltd.*, 64 F.R.D. 648, 650-51 (S.D.N.Y. 1974), *appeal dismissed*, 538 F.2d 313 (2d Cir. 1976); *SEC v. Vesco*, 58 F.R.D. 182 (S.D.N.Y. 1973). Quite simply, third party injured investors have no vested interest in the remedy in an SEC disgorgement action since the disposition of such an action does not impair their private right to damages.

Moreover, the disgorgement remedy under the securities laws is a government enforcement mechanism the central purpose of which is to determine the amount by which a wrongdoer has been unjustly enriched and to make him disgorge that amount. *SEC v. Commonwealth Chemicals Securities, Inc.*, 573 F.2d 90, 102 (2d Cir. 1978); *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978); *SEC v. Penn Central Co.*, 425 F. Supp. 593, 599 (E.D. Pa. 1976). The disgorgement remedy was not designed to provide redress victims who have suffered injury. If compensation results, it is only a by-product of the agency's efforts to reestablish compliance with its regulatory scheme. As stated by the Court of Appeals for the Sixth Circuit:

> Once the Commission has established that defendant has violated the securities laws, the district court possesses the equitable power to grant disgorgement without requiring whether, or to what extent, identifiable private parties have been damaged by [the defendant's] fraud.

SEC v. Blavin, 7660 F.2d 706, 713 (6th Cir. 1985). As otherwise stated by the court in *SEC v. Andes,* No. 82-1659, *slip op.* at p. 4 (E.D. Pa. Jan. 23, 1986) "it is significant to note that the primary purpose of disgorgement is not to compensate investors .... [T]his court does not view Mr. Hogan as having an 'entitlement' to share in the distribution here."

In sum, both the district court and the court of appeals have properly decided this case, the SEC reasonably entered into a settlement which based on the allegations of its complaint allowed claimants who, during an alleged period of violation, suffered out-of-pocket losses to receive a proportionate share of disgorged profits obtained in connection with an SEC enforcement matter. Mr. Olagues' transactions were completed before the commencement of the window period and he did not trade during the window period. The SEC properly exercised it prosecutorial discretion bringing the case in the manner in which it did and settling it in the manner which it did. Mr. Olagues has no interest which would have allowed him to intervene in the SEC proceeding since he cannot demonstrate any interest relating to the property or transaction which is the subject of the action. Because he was not induced by defendants acting on inside information to purchase or sell securities during the window period he has no claim under Rule 10b-5 to

the settlement fund and no significantly protectable interest in the litigation that could have been impaired. Indeed, he has no protectable interest in disgorgement funds whatsoever, since the disposition of any such funds whether they related to the same period or not did not impair Mr. Olagues' private right of action for damages. Both the District Court and the Court of Appeals were correct in their determination that Mr. Olagues lacked standing to challenge the settlement or to intervene in the litigation.

III. The Petition Fails to State a Reason For Granting Certiorari

Rule 17 of this Court provides:

> 1. A review on *writ* of *certiorari* is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:
>
> a. When a federal court of appeals has rendered a decision in conflict with a decision of another federal court of appeals on the same manner; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted unusual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision . . . .
>
> c. When a state court or a federal court of appeals has decided an important question of

> federal law which has not been, but should be, settled by this Court or has decided a federal question in a way in conflict with applicable decisions of this Court.

Olagues has shown no conflicts among the circuits, no conflict with the decisions of this Court, no important question of federal law that this Court has not previously decided, and certainly no unusual departure from the normal course of judicial proceedings.

IV. Conclusion

No basis for review by this court exists, the court below properly decided the matters raised before them, and no *writ* of *certiorari* should issue.

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In the Supreme Court of the United States

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v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

Petitioner contends that the court of appeals erred in holding that he lacks standing to challenge the settlement of an insider trading case to which he was not a party.

1. In October 1981, the Securities and Exchange Commission (SEC) filed an enforcement action in the United States District Court for the Southern District of New York alleging that, between September 21, 1981, and October 1, 1981 ("the window period"), certain unidentified individuals had purchased common stock of Santa Fe International Corporation (Santa Fe) and call options for that stock while in possession of material non-public information concerning an anticipated merger between Santa Fe and Kuwait Petroleum Company. The complaint sought injunctive relief against future violations of the securities laws and disgorgement of illegal profits obtained during the window period. On October 26, 1981, the dis-

trict court entered a temporary restraining order freezing all proceeds subject to disgorgement. The court subsequently entered a preliminary injunction, thereby continuing the freeze until the case was settled. Pet. App. 4b.

While the SEC's suit was pending, two groups of private investors brought civil actions to recover damages based on defendants' illegal trading in Santa Fe securities. After the individual defendants were identified, a settlement of the claims was negotiated, including the claims of the two investor groups. Under the settlement, the defendants agreed to disgorge profits of $7.8 million. The settlement included a plan of distribution under which two claims funds were established to compensate persons who had traded in Santa Fe options or common stock during the window period and were injured by defendants' trading. One fund—to which a total of $4.5 million was allocated—was for persons who had suffered out-of-pocket losses while trading in Santa Fe options. The other fund—to which approximately $495,000 was allocated—was for persons who had suffered out-of-pocket losses as a result of trading in Santa Fe common stock. Also as part of the settlement, a payment of $2.85 million was to be made to the two investor groups in settlement of their separate suits. Pet. App. 4b-6b.

On February 26, 1986, the district court entered an order finding that "the terms and conditions proposed by the parties to establish a claims fund and claims procedure are a good faith, fair and reasonable proposal" (Pet. App. 2d). In its order, the court appointed a master to oversee the distribution of the claims funds and to notify the claimants of the claims procedure. The court also scheduled a hearing for June 13, 1986, to consider objections to the proposed settlement raised by any claimant. Pet. App. 5b-6b, 9d-10d, 23d.

Petitioner subsequently filed written objections and appeared at the June 13th hearing. Although he had not

traded in Santa Fe options or stock during the window period,[1] he maintained that he was nonetheless entitled to file a claim. Specifically, he contended that the proposed settlement should be modified to permit claims, such as his, based on options transactions *before* the window period (C.A. App. 200, 249-250). The district court rejected petitioner's argument and denied his motion to intervene as a party (Pet. App. 9b). The court reasoned that because petitioner did not trade in Santa Fe options during the period at issue in the complaint, his injury was not caused by defendants' trading during that period but rather by "the fact that a merger was announced" (C.A. App. 253).

2. The court of appeals affirmed the denial of intervention and dismissed petitioner's appeal for lack of standing (Pet. App. 8b-9b). In its view, "[b]ecause [petitioner] was not induced by persons acting on inside information to purchase or sell securities during [the relevant] period, he has no claim under Rule 10b-5 to the settlement fund and no 'significantly protectable interest' in the litigation that might be impaired by the disposition of this case" (Pet. App. 9b (citation omitted)).

3. The court of appeals correctly concluded that petitioner lacks standing to challenge the settlement agreement. Petitioner was not a party to the proceedings, and as the court of appeals noted (Pet. App. 9b (citing authority)), nonparties generally lack standing to appeal. The fact that the SEC submitted the plan of distribution

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[1] The complaint alleged that defendants' stock purchases occurred between September 21 and September 23, 1981, and that their options purchases occurred between September 22 and October 1, 1981 (C.A. App. 26-29, 31). Petitioner alleges (Pet. 16) that between August 11, 1981, and September 21, 1981, he wrote a large number of call option contracts, which remained open until October 6, 1981 (the day after the inside information became public (see Pet. App. 4b)), and that he sustained a loss of $500,000.

for court approval and invited comments by potential claimants did not alter petitioner's status as a nonparty. See, *e.g.*, *United States* v. *LTV Corp.*, 746 F.2d 51, 53 (D.C. Cir. 1984). And since petitioner was not a party to the private actions settled simultaneously with the SEC suit, and was not bound by the judgments in those actions, he was not entitled to be heard concerning the settlement of those actions.

Nor is there any reason why, notwithstanding his status as a nonparty, petitioner should be allowed to challenge the settlement agreement. Petitioner views the window period as an arbitrary time period, and he submits that he was injured by defendants' conduct (Pet. 16). In fact, the window period was the only interval at issue in the SEC's complaint. As the district court observed, since petitioner did not trade in Santa Fe options during the relevant period (see note 1, *supra*), his injury was not caused by the insider trading alleged in the complaint (C.A. App. 253).[2]

If petitioner believed that he was injured by defendants' actions, he was free to file his own civil suit. The fact that he chose not to do so does not entitle him to challenge the settlement agreement involved here. As the court of appeals noted (Pet. App. 10b), petitioner "should not expect to be able to stand aside and watch others incur the expenses of lengthy litigation and then upset the results of those efforts."

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[2] Petitioner errs in asserting (Pet. 6) that the present decision "flies in the face of" this Court's decision in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975). In *Blue Chip*, the Court held that offerees of a stock offering, who had neither purchased nor sold any of the offered shares, were not entitled to maintain a private damages action under SEC Rule 10b-5. Petitioner's argument appears to be that, conversely, anyone who ever *did* sell Santa Fe options has standing to assert a claim, even in someone else's lawsuit asserting violations at a different time period. *Blue Chip* says no such thing.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1988

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